146 U.S. 517

RECORD, CASE No. 13,610.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM No., 398. 76

THE NATIONAL TUBE WORKS COMPANY, APPELLANT,

vs.

GEORGE WILLIAM BALLOU.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED AUGUST 19, 1889.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., MARCH 31, 1892.

1 [L. S.] The President of the United States of America to George William Ballou, Greeting:

You are hereby commanded that you personally appear before the judges of the circuit court of the United States of America for the southern district of New York, in the second circuit court, in equity, on the first Monday of December, A. D. 1888, wherever the said court shall then be, to answer a bill of complaint exhibited against you in the said court by the National Tube Works Company, and do further and receive what the said court shall have considered in that behalf; and this you are not to omit under the penalty on you of two hundred and fifty dollars.

Witness Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at the city of New York, on the first day of November, in the year one thousand eight hundred and eighty-nine, and of the Independence of the United States of America the one hundred and thirteenth.

JOHN A. SHIELDS, *Clerk.*

SULLIVAN & CROMWELL,
Complainant's Sol'rs.

The defendant is required to enter appearance in the above cause, in the clerk's office of this court, on or before the first Monday of December, 1888, or the bill will be taken *pro confesso* against him.

J. A. S., *Clerk.*

2 I hereby certify that on the 1st day of November, 1888, at the city of New York, in my district, I personally served the within subpœna in equity upon the within-named defendant, George William Ballou, by exhibiting to him the within original and at the same time leaving with him a copy thereof; and at the same time and place I delivered to said defendant, Ballou, a copy of the bill of complaint in this suit.

Dated Nov. 1st, 1888.

M. T. McMAHON,
United States Marshal, Southern District of New York,
P'r JOHN E. DOWLING, *Deputy.*

[Endorsed:] United States circuit court. Nov. 6, 1888. John A. Shields, clerk.

3 Circuit Court of the United States in and for the Southern District of New York.

THE NATIONAL TUBE WORKS COMPANY *against* GEORGE WILLIAM BALLOU. } In Equity.

To the judges of the circuit court of the United States for the southern district of New York:

The National Tube Works Company, a corporation organized and existing under and by virtue of the laws of the Commonwealth of

Massachusetts and a citizen thereof, suing on behalf of itself and such other creditors of the Wiley Construction Company as may come in and be made parties hereto and contribute to the expenses of this suit, bring- this its bill against George William Ballou, of New York city and a citizen of the State of New York.

And thereupon your orator complains and says:

First. Your orator is a corporation duly organized and existing under and by virtue of the laws of the State of Massachusetts and having its principal office for the transaction of its business at the city of Boston, in said State, and your orator is a citizen of said State.

Second. Upon information and belief, that the Wiley Construction Company was organized in or about the month of February, 1880, under the joint stock laws of the State of Connecticut, and located in Hartford, Connecticut. The certificate of organization of said company was executed on or about February 9, 1880, and was filed in the office of the secretary of state of Connecticut on or about February 19, 1880. A copy of said certificate so filed is hereunto annexed, marked Exhibit A, and is made a part hereof. The capital stock of said company was fixed at $500,000, divided into 5,000 shares of $100 each. That all of said stock was subscribed for, and that the defendant, Ballou, subscribed and agreed to pay at par for 2,499 shares of $100 each, to wit, $249,900 of said stock; that the defendant has never paid in anything on account of said subscription.

That immediately after its organization and the filing of the certificate aforesaid the said The Wiley Construction Company proceeded to carry on the business for which it was organized, and continued to carry on the same until about July, 1883, the defendant and the other subscribers to said stock taking an active part in the management thereof and acting as stockholders and directors thereof.

Third. That between the 1st day of May, 1880, and the 5th day of August, 1882, your orator sold and delivered to the said The Wiley Construction Company certain goods, wares, and merchandise of the value and at the agreed price of $78,955,49; that the said construction company has paid no part thereof except the sum of $40,789.51, paid at various times between October 19th, 1880, and July 27th, 1883, on account thereof; that on or about the 10th day of March, 1883, the defendant, being then indebted to your orator in the sum of $49,828.37, being the balance, with interest, of said amount for goods sold and delivered to it, made its certain promissory note in writing, wherein, for said value received, it promised to pay to the order of your orator the said sum of $49,828.37, with interest, on demand, and duly delivered said promissory note to your orator, who is now the lawful owner and holder thereof; that no part of said note has been paid, although payment thereof was demanded.

Fourth. That thereafter, in or about the month of October, 1886, in the superior court of the State of Connecticut, held in and for the county of Hartford, in said State, a court of competent jurisdiction, in an action pending in said court, wherein your orator was the plaintiff and the said The Wiley Construction Company was the de-

fendant, and in which the said defendant therein was duly served with process and appeared therein, a judgment was recovered therein on said promissory note by your orator against the said The Wiley Construction Company for the sum of $52,041.51 damages and costs.

That thereafter, in or about the month of June, 1887, said judgment was, on appeal, affirmed by the supreme court of errors of the State of Connecticut, a court of competent jurisdiction, and has never been reversed, satisfied, or cancelled.

Fifth. That thereafter execution was issued out of said superior court against the property of said Wiley Construction Company to the sheriff of the county of Hartford, wherein the principal office of said company is situated, and said execution has been returned wholly unsatisfied.

That the said construction company has no fund or assets where-
with to pay the claim of your orator, and that the whole of
6 said amount of $52,041.51 is still due to your orator, as afore-
said, and is unpaid.

In consideration whereof, and forasmuch as your orators *are* remediless in the premises at law and can have no adequate relief save in a court of equity, your orator prays:

1st. That the said George William Ballou be made a defendant to this bill and be compelled to answer your orator's complaint without oath, answer on oath being hereby waived.

2d. That an accounting be had of the amount unpaid upon the stock subscription of the said defendant in the Wiley Construction Company, and that said defendant be decreed to pay so much of the balance found unpaid on his subscription as will be sufficient to pay such debts of said corporation as may be proved in this suit, including the judgment aforesaid in favor of your orator.

3d. And that your orator may have such other and further relief in the premises as may be just and proper, together with the costs and expenses of this suit.

May it please the court to grant unto your orator a writ of subpœna, to be issued out of and under the seal of this honorable court and directed to the said George William Ballou, commanding him, at a certain day and under a certain penalty therein inserted, personally to be and appear before this court and then and there answer this complaint, and to stand and abide by and perform such order, direction, or decree as shall be made therein.

And your orator will ever pray.

THE NATIONAL TUBE WORKS CO.,
Complainant.

SULLIVAN & CROMWELL,
Solicitors and of Counsel for Complainants,
3 *Broad Street, New York City.*

7 STATE OF NEW YORK, }
City and County of New York, } *ss:*

William J. Curtis, being duly sworn, deposes and says that he is a member of the firm of Sullivan & Cromwell, solicitors for the

complainant in the above bill; that he has read the said bill of complaint and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

Deponent further says that the reason why this verification is not made by the complainant is that the complainant is a foreign corporation, having its principal place of business at Boston, Massachusetts.

That deponent is the solicitor of said complainant, and that the sources of his information as to all matters not therein alleged of his own knowledge are correspondence had with the complainant and its officers at Boston and the inspection of the documents in the case which are now in deponent's possession.

WM. J. CURTIS.

Sworn to before me this 31st day of October, 1888.

[NOTARY'S SEAL.] ALFRED JARETZKI,
Notary Public, New York County, N. Y.

EXHIBIT A.

STATE OF CONNECTICUT,
OFFICE OF SECRETARY OF STATE.

The Wiley Construction Company.

(*Certificate of Organization.*)

Know all men that the undersigned, being the president and a majority of the directors of the Wiley Construction Com-
8 pany, a corporation organized under the statute laws of the State of Connecticut regulating the formation of joint stock corporations, and located in the town of Hartford, county of Hartford, in said State, in pursuance of said statute laws hereby certify as follows, to wit:

1st. The purposes for which said corporation is formed are the following, to wit: To construct water works, gas works, and electric light works for cities, towns, villages, and municipalities in the United States and elsewhere, either under contracts for others or to build, own, and operate such works on this company's account; also to construct canals, flumes, dams, and any works for irrigating, mining, or manufacturing purposes, and to own and operate such works; to construct telegraph lines and railroads for others under contract or to build and operate any private line of telegraph or railroad that may be necessary or useful in the carrying out of any mining or other business of the company; to buy, sell, hold, and develop mines and other real estate in any part of North America; to construct and operate wagon roads, and, as incidental to the foregoing business, to buy, sell, and hold the stock or bonds of any mining company, smelting company, water works company, gas works company, electric light company, telegraph company, railroad company,

or of any corporation, and generally to do all things incidental to all of the aforesaid business and the proper management thereof.

2d. The amount of their capital stock is five hundred thousand dollars.

3d. The amount of their capital stock actually paid in is one hundred thousand dollars.

4th. The names and residences of their stockholders and the number of shares owned by each respectively *is* as follows, to wit:

9	Solon L. Wiley, of Greenfield, Mass.	2,500 shares.
	George Wm. Ballou, of Boston, "	2,499 "
	George E. Beatty, " "	1 share.

And in further pursuance of said statute laws we cause this certificate to be deposited with the secretary of state of Connecticut and a duplicate thereof with the town clerk of the town of Hartford, in which said corporation is to transact its business.

Dated at Boston this ninth day of February, A. D. 1880.

SOLON L. WILEY, *President.*

GEO. W. BALLOU,
GEO. E. BEATTY,
SOLON L. WILEY, } *Directors.*

STATE OF MASSACHUSETTS, *County of Suffolk,* } ss:

BOSTON, *February* 12, *A. D.* 1880.

Then and there personally appeared George E. Beatty and George Wm. Ballou, being a majority of the directors of the Wiley Construction Company, and made oath to the truth of the foregoing certificate signed by them before me—

[L. S.] JAMES W. CHAPMAN,
A Commissioner for the State of Connecticut.

THE STATE OF OHIO, *Seneca County,* } ss:

Be it remembered that on the ninth day of February, A. D. 1880, at the county aforesaid, personally appeared before me, the undersigned, a notary public in and for said county, Solon L. Wiley, being the president and in connection with George E. Beatty a majority of the directors of the Wiley Construction Company,
10 and made oath to the truth of the foregoing certificate signed by him before me.

Witness my hand and notarial seal on the day and year aforesaid.

PERRY M. ADAMS,
[L. S.] *Notary Public, Seneca County, Ohio.*

THE STATE OF OHIO, *Seneca County,* } ss:

I, Jeremiah Rex, clerk of the court of common pleas within and

for said county of Seneca, do hereby certify that Perry M. Adams, before whom the foregoing affidavit was made and whose name is subscribed to the certificate thereof and therein written, was at the time of taking such affidavit a notary public in and for said county, duly commissioned and qualified, and was duly authorized to take the same, and that full faith and credit are due all his official acts as such, and, further, said signature is genuine, as I verily believe, and that said instrument is executed according to the laws of this State.

In witness whereof I have hereunto set my name and affixed the seal of said court, at the city of Tiffin, this tenth day of February, A. D. 1880.

[L. S.] JEREMIAH REX, *Clerk.*

Received and filed February 19, 1880.

STATE OF CONNECTICUT, *ss:*

OFFICE OF SECRETARY OF STATE.

I hereby certify that the foregoing is a true copy of the record in this office.

In testimony whereof I have hereunto set my hand and affixed the seal of said State, at Hartford, this 13th day of February, A. D. 1887.

LEVERETT M. HUBBARD,
Secretary of State.

(Endorsed:) United States circuit court. National Tube Works Company ag'st George William Ballou. Bill of complaint. Sullivan & Cromwell, att'ys. U. S. circuit court. Filed Nov. 1st, 1888. John A. Shields, clerk.

11 Circuit Court of the United States for the Southern District of New York.

THE NATIONAL TUBE WORKS COMPANY
against
GEORGE WILLIAM BALLOU.

SIR: Please enter our appearance as solicitors for defendant, George William Ballou, in the above-entitled suit.

Dated New York, December 3d, 1888.

SIMPSON, THACHER & BARNUM,
Solicitors for George Wm. Ballou.

Office and post-office address, 10 Wall street, N. Y. city.

To John A. Shields, Esq., clerk of the United States circuit court for the southern district of New York.

(Endorsed:) U. S. circuit court, southern dist. of N. Y. The National Tube Works Company ag'st George William Ballou. Notice of appearance. Simpson, Thatcher & Barnum, attorneys for def't, 10 Wall street, New York. U. S. circuit court. Filed Dec. 3, 1888. John A. Shields, clerk.

12 Circuit Court of the United States, Southern District of New York.

THE NATIONAL TUBE WORKS COMPANY
against
GEORGE WILLIAM BALLOU. } In Equity.

The Demurrer of the Defendant, George William Ballou, to the Bill of Complaint of the Above-Named Complainant.

This defendant, by protestation, not confessing or acknowledging all or any of the matters or things in the said bill of complaint contained to be true in such manner and form as the same are therein set forth and alleged, demurs to the said bill and for causes of demurrer shows:

First. That the said complainant hath not by his said bill made such a case as entitles him in a court of equity to any discovery or relief from or against this defendant touching the matters contained in said bill or any of such matters.

Second. That it appears by the said complainant's own showing by his said bill of complaint that the complainant is not entitled to the discovery or relief prayed for by his said bill against this defendant.

Wherefore, and for divers other good causes of demurrer appearing in the said bill of complaint, this defendant does demur to the said bill and to all the matters and things therein contained, and humbly prays the judgment of this honorable court whether
13 he shall be compelled to make any further or other answer to the said bill; and he prays to be hence dismissed with his reasonable costs in this behalf sustained.

SIMPSON, THATCHER & BARNUM,
Solicitors for Defendant, 10 Wall Street, N. Y. City, N. Y.

THOMAS THATCHER, *Of Counsel.*

I hereby certify that, in my opinion, the foregoing demurrer is well founded in point of law.

THOMAS THATCHER.

SOUTHERN DISTRICT OF NEW YORK,
City, County, and State of New York, } *ss:*

George William Ballou, being duly sworn, deposes and says that the foregoing demurrer is not interposed for delay.

GEO. WM. BALLOU.

Subscribed and sworn to before me this 5th day of January, 1889.

HENRY B. ANDERSON,
[SEAL.] *Notary Public, New York County.*

(Endorsed:) United States circuit court, southern district of New York. The National Tube Works Company *vs.* George William Ballou. Demurrer. Simpson, Thacher & Barnum, solicitors for

def't, 10 Wall St., N. Y. city. U. S. circuit court. Filed Jan'y 7th, 1889. John A. Shields, clerk.

14 THE NATIONAL TUBE WORKS COMPANY
vs.
BALLOU.

WALLACE, *J.:*

The demurrer to the bill must be sustained upon the authority of the previous decisions of this court in Claflin *v.* McDermott (12 Fed. Rep., 375) and Walser *v.* Seligman (13 Fed. Rep., 415). As those cases were decided by me, I feel free to say that I doubt whether they do not adopt a too technical view of the right of a creditor whose judgment has been obtained against his debtor at the place of his domicil and whose execution has been issued there and returned unsatisfied to maintain a creditor's bill in a court of another State; and I may be permitted to express the hope that the present case may be taken to the Supreme Court for review.

(Endorsed:) National Tube Works Co. *vs.* Ballou. Mem.—Wallace, J. U. S. circuit court. Filed Mar. 18, 1889. John A. Shields, clerk.

15 Circuit Court of the United States for the Southern District of New York.

THE NATIONAL TUBE WORKS CO.
v.
GEORGE WILLIAM BALLOU. } In Equity.

This cause having been brought on to be heard on bill of complaint and demurrer, and having been argued by counsel, and the demurrer having been sustained, on consideration thereof it is ordered, adjudged, and decreed by the court that the complainant's said bill of complaint be, and the same is hereby, dismissed, and that complainant pay to defendant the sum of twenty-eight $\frac{62}{100}$ dollars, as taxed herein, and that defendant have execution therefor.

WM. J. WALLACE.

16 (Endorsed:) Circuit court of the United States for the southern district of New York. The National Tube Works Co. *v.* George William Ballou. Decree. Simpson, Thacher & Barnum, attorneys for defendant, 10 Wall street, New York. U. S. circuit court. Filed Mar. 25th, 1889. John A. Shields, clerk.

17 Circuit Court of the United States for the Southern District of New York.

THE NATIONAL TUBE WORKS COMPANY
against
GEORGE WILLIAM BALLOU.

To the honorable the Supreme Court of the United States:

The appeal of the above-named complainant and appellant respectfully showeth—

That heretofore and on the first day of November, 1888, the above-named complainant filed its bill in the circuit court of the United States for the southern district of New York against George William Ballou.

That afterwards the defendant filed his demurrer to said bill.

That argument having been had and said demurrer having been sustained, afterwards, on the 25th day of March, 1889, a decree was made and pronounced in this case wherein it was in substance adjudged and decreed as follows:

18 "It is ordered, adjudged, and decreed by the court that the complainant's said bill of complaint be, and the same is hereby, dismissed, and that complainant pay to the defendant the sum of twenty-eight and $\frac{62}{100}$ dollars ($28.62), as taxed herein."

That said decree and every part thereof is, as this complainant and appellant is advised, wholly erroneous.

Wherefore this complainant appeals from the whole of said decree of said circuit court of the United States and from each and every part thereof and respectfully prays that the decree of said circuit court and the appeal and demurrer to the proceedings in said cause be sent to the Supreme Court of the United States without delay, and that the said Supreme Court will proceed to hear the cause anew, and the said decree of the said circuit court and every part thereof may be reversed and such other and further decree made in the premises as to the Supreme Court may seem just and proper.

19 Dated April 3d, 1889.

SULLIVAN & CROMWELL,
Solicitors for Appellant.
W. J. CURTIS, *Counsel.*

The foregoing appeal is hereby allowed.
Dated New York, April 26th, 1889.

WM. J. WALLACE.

We admit due service this day of a copy of the within petition in appeal.
N. Y., May 7th, 1889.

SIMPSON, THACHER & BARNUM,
Solicitors for Defendant.

(Endorsed:) Circuit court of the United States for the southern district of New York. The National Tube Works Company against George William Ballou. Appeal. Sullivan & Cromwell, attorneys for appellant, Drexel building, Wall St., New York city. U. S. circuit court. Filed May 8, 1889. John A. Shields, clerk.

20 Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

THE NATIONAL TUBE WORKS COMPANY *vs.* GEORGE WILLIAM BALLOU. } Bond for Damages and Costs.

Know all men by these presents that we, W. H. Armstrong and

E. C. Converse, of the city, county, and State of New York, are held and firmly bound unto the above-named George William Ballou in the sum of two hundred and fifty dollars, to be paid to the said George William Ballou; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the sixth day of April, in the year of our Lord one thousand eight hundred and eighty-nine.

Whereas the above-named complainant has prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled suit by the judge of the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such that if the above-named complainant shall prosecute its appeal to effect and answer all damages and costs if it fail to make such appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

[SEAL.] W. H. ARMSTRONG.
[SEAL.] E. C. CONVERSE.

Sealed and delivered and taken and acknowledged this sixth day of April, 1889, before me—

ALFRED JARETZKI,
[SEAL.] *Notary Public, New York County, N. Y.*

21 [Endorsed:] U. S. circuit court, southern district of New York. The National Tube Works Company *vs.* George William Ballou. Bond for costs on appeal to Supreme Court. Sullivan & Cromwell, Drexel b'ld'g, Wall St., N. Y. city. The within bond is hereby approved as to form, amount, and sufficiency of the sureties. Dated N. Y., April 26, 1889. Wm. J. Wallace. U. S. circuit court. Filed Apr. 26, 1889. John A. Shields, clerk.

We hereby accept the sufficiency of the sureties upon the within bond.

N. Y., April 25th, '89.

SIMPSON, THACHER & BARNUM,
Solicitors for Defendant.

UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

W. H. Armstrong and E. C. Converse, being duly sworn, depose and say each for himself that he is worth the sum of five hundred dollars over and above all his just debts and liabilities.

W. H. ARMSTRONG.
E. C. CONVERSE.

Sworn to this sixth day of April, A. D. 1889, before me—

ALFRED JARETZKI,
[SEAL.] *Notary Public, N. Y. Co.*

22 United States of America to George William Ballou, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October, 1889, pursuant to an appeal filed in the clerk's office of the United States for the southern district of New York, wherein The National Tube Works is appellant and you are appellee, to show cause, if any there be, why the decree in the said appeal mentioned should not be corrected and speedy justice be done to the parties in that behalf.

Dated April 26th, 1889.

WM. J. WALLACE.

We admit due service of the above citation this day.
N. Y., May 7th, 1889.

SIMPSON, THACHER & BARNUM,
Solicitors for Defendant.

23 (Endorsed:) Circuit court of the United States for the southern district of New York. The National Tube Works Company against George William Ballou. Citation on appeal. Sullivan & Cromwell, attorneys for appellant, Drexel building, Wall St., New York city. U. S. circuit court. Filed May 8, 1889. John A. Shields, clerk.

24 UNITED STATES OF AMERICA, } ss:
Southern District of New York, }

I, John A. Shields, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from one to twenty-three, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of The National Tube Works Company, complainant & appellant, against George William Ballou, defendant & appellee, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 2d day of August, in the year of our Lord one thousand eight hundred and eighty-nine, and of the Independence of the said United States the one hundred and fourteenth.

Seal of U. S. Circuit Court, South. Dist. New York.

JOHN A. SHIELDS, *Clerk.*

Endorsed on cover: Case No. 13,610. S. New York C. C. U. S. No. 398. The National Tube Works Company, appellant, *vs.* George William Ballou. Filed August 19, 1889.

146 U.S. 517

OCT 20 1892
JAMES H. McKENNEY
CLERK

United States Supreme Court.

THE NATIONAL TUBE WORKS COMPANY,
Appellant,

vs.

GEORGE WILLIAM BALLOU,
Appellee.

W. J. CURTIS,
For Appellant.

The Evening Post Job Printing House, New York.

United States Supreme Court.

THE NATIONAL TUBE WORKS COMPANY,
Appellant,

vs.

GEORGE WILLIAM BALLOU,
Appellee.

Statement.

In October, 1886, the complainant recovered a judgment in the Superior Court in the State of Connecticut for Hartford County against the Wiley Construction Company for the sum of $52,041.51, being the balance due on the sale and delivery of merchandise.

Execution upon the judgment was issued to the Sheriff of Hartford County, which was the county in which the principal office of the company was situated. This execution was returned unsatisfied; the company has no assets, and complainant's claim has never been paid. Thereupon the complainant on behalf of itself and all other creditors of the company who might come in and seek relief by and contribute to the expense of this suit, filed its bill in equity in the Circuit Court of the United States for the Southern District of New York against the respondent George W. Ballou, averring that the Wiley Construc-

tion Company was organized in February, 1880, as a corporation under the joint stock laws of the State of Connecticut and is located at Hartford, in the County of Hartford in that State; that it was organized with a capital stock of $500,000, divided into shares of $100 each, and that respondent Ballou was one of the incorporators of said company, and subscribed and agreed to pay at par for 2,499 shares of its stock of the par value of $100 each, viz., $249,900; that a complete organization of the company was effected, and the company commenced business and continued to carry it on until July, 1883, the respondent taking an active part in the management and acting as a stockholder and director of the company; that while thus engaged in business the Wiley Construction Company purchased from the complainant merchandise of the agreed price of $78,955.49, upon which a balance remained unpaid on March 10, 1883, of $49,828.37.

The complaint further alleges the recovery of the judgment aforesaid; that execution was issued thereon to the Sheriff of Hartford County, where the company is located, and that the execution has been returned unsatisfied; that the Wiley Construction Company ceased to do business in July, 1883, and is wholly insolvent and unable to pay its debts; that no part of its capital stock has ever been paid in and that respondent has never paid any part of his subscription.

The bill of complaint then prays that upon an accounting of the amount unpaid upon the stock subscription of the defendant stockholder, he may be decreed to pay so much of the balance found unpaid on his subscription as will be sufficient to pay the ascertained debts of the corporation, including the judgment aforesaid and for general relief.

Defendant demurred to the complaint for want of equity, and in support of his demurrer relied on the fact that complainant had not recovered judgment,

and issued execution against the Wiley Construction Company within the State of New York.

Judge Wallace sustained the demurrer. His opinion is so short that we insert it in full; it is as follows:

"The demurrer to the bill must be sustained upon the authority of the previous decisions of this Court in Claflin *vs.* McDermott (12 Federal Reporter, 375), and Walser *vs.* Seligman (13 Federal Reporter, 415). As those cases were decided by me, I feel free to say that I doubt whether they do not adopt a too technical view of the right of a creditor whose judgment has been obtained against his debtor at the place of his domicil, and whose execution has been issued there and returned unsatisfied to maintain a creditor's bill in a court of another State; and I may be permitted to express the hope that the present case may be taken to the Supreme Court for review."

Complainant has accordingly appealed to this Court.

The following facts are also important:

Complainant is a Massachusetts corporation, located at Boston, in the State of Massachusetts; the defendant, Ballou, is a citizen and resident of the State of New York. The State of New York is, accordingly, the only place where this action can be brought.

The Wiley Construction Company is a corporation organized under the laws of the State of Connecticut, and is located at Hartford, in the County of Hartford, in said State. The courts of the State of New York have no jurisdiction in the case brought by complainant against the Wiley Construction Company on complainant's claim for goods sold and delivered, so that it would be impossible to overcome the objection raised by the demurrer.

If complainant cannot recover herein, it is entirely without remedy.

Argument.

I.—*The unpaid subscriptions to the capital stock of the Wiley Construction Company constitute a trust fund for the benefit of the company's creditors. This is true regardless of any statutory provision in the matter.*

The earliest authority upon this point is said to be the case of *Dr. Salmon* v. *The Hamburgh Company*, decided in 1670, reported in 1 Cases in Ch., 204, and 6 Viner's Abridg., 310, 311. The bill in that case alleged that Salmon held a bond of the company for eighteen hundred pounds, given to him for money lent to the company for its uses. The company was incorporated and had power to assess rates by poll on every member to defray the charges of the company. The company, though served with process, failed to appear, but several members who were served did appear and demur on the ground that they were not individually liable to the plaintiff's demand. The Lord Chancellor sustained the demurrer and dismissed the bill, but on appeal to the House of Lords the decree of the Chancellor was reversed and the case remanded to this Court with directions to cause the officers of the company "to make such leviation upon every member of said company who is to be contributory to the public charge as shall be sufficient to satisfy the said sum to be decreed to the plaintiff in this cause, and to collect and levy the same and to pay it over to the plaintiff as the Court shall direct."

The modern doctrine on this subject is well expressed in the opinion of Mr. Justice Miller in *Sawyer* v. *Hoag*, 17 Wall., 610, where he says:

"Though it be a doctrine of modern date, we "think it now well established that the capital stock "of a corporation, especially its unpaid subscrip- "tions, is a trust fund for the benefit of the general

" creditors of the corporation. And when we con-
" sider the rapid development of corporations as in-
" strumentalities of the commercial and business
" world in the last few years, with the correspond-
" ing necessity of adapting legal principles to the
" new and varying exigencies of the business, it is
" no solid objection to such a principle that it is
" modern, for the occasion for it could not sooner
" have arisen."

It has been well said by a text writer (Cook on Stock, Stockholders & Corporation Law, Sec. 199, 2d Ed.), that the public, in dealing with a corporation, has the right to assume that its actual capital, in money or money's worth, is equal to the capital stock which it purports to have, unless it has been impaired by business losses; that the public has a right also to assume that the capital stock has been or will be fully paid up, if it be necessary, in order to meet corporate liabilities.

The same rule is that set out in *Sawyer* v. *Upton* (91 U. S , 60): " The capital stock of an incorporated company is a fund set apart for the payment of its debts. It is a substitute for the personal liability which subsists in private copartnerships. When debts are incurred, a contract arises with the creditors that it shall not be withdrawn or applied, otherwise than upon their demands, until such demands are satisfied. *The creditors have a lien upon it in equity.* If diverted they may follow it, as far as can be traced, and subject it to the payment of their claims as against holders who have taken it *bona fide* for a valuable consideration and without notice. It is publicly pledged to those who deal with the corporation for their security. Unpaid stock is as much a part of this pledge and as much a part of the assets of the company as the cash which has been paid in upon it. Creditors have the same right to look to it as to anything else and the same right to insist upon its payment as upon the payment of any other debt due to the company. As

regards creditors, there is no distinction between such a demand and any other assets which may form a part of the property and effects of the corporation."

See, also,

Angell & Ames on Corporations (10th Ed.), Secs. 598-611.

Wood v. *Dummer*, 3 Mason, 308.

Briggs v. *Penniman*, 8 Cow., 387.

II.—*To be entitled to reach this trust fund, a creditor need only show that he has exhausted his legal remedies against the company itself.*

It has been rather brusquely said that it is not the business of a court of equity to collect claims, and it has always been well understood that a court of equity will not entertain jurisdiction of a case where there is a complete remedy at law. It is for this reason that a creditor of a corporation must show that he has exhausted his remedy at law before he can successfully invoke the aid of a court of equity.

For a full understanding of this rule and of its limitations, and especially for a proper conception of what is a sufficient compliance with the condition that the legal remedy must be exhausted, it will be well to glance at the origin of the rule.

The jurisdiction of equity to entertain suits in aid of creditors undoubtedly had its origin in the narrowness of the common law remedies by writs of execution. These writs, issued by courts of common law, besides being otherwise limited in their operation, were, of course, confined to those estates and interests recognized by the law and did not extend to estates and interests equitable in their nature. Creditors' suits were, therefore, permitted to be

brought in those instances where the relief by execution at common law was ineffectual, as for a discovery of assets, to reach equitable and other interests not subject to levy and sale at law, and to set aside fraudulent conveyances and obstructions.

It is a necessary result from the whole theory of creditors' suits, says Pomeroy in his treatise on Equity Jurisprudence, Sec. 1415, that jurisdiction in equity will not be entertained where there is a remedy at law.

A creditor's suit to reach equitable assets of a corporation debtor is, of course, subject to the same rule; the creditor seeks the aid of a court of equity because he has ho remedy at law, and the Court of Equity will only entertain his suit when he has no remedy at law. Absence of remedy at law is the basis of jurisdiction; it is immaterial what the cause of the situation is, *i. e.*, whether the creditor has exhausted his remedy at law or whether he never had any remedy at law.

III.—*The National Tube Works Company has exhausted its remedies at law against the Wiley Construction, and is entitled therefore to the assistance of a court of equity in collecting the unpaid stock subscriptions of the latter company to pay its debts.*

In pursuit of its remedy at law the National Tube Works Company has done the following things:

1. It has brought and prosecuted to judgment an action on its claim against the Wiley Construction in the Superior Court of Hartford County, Conn. This judgment has been affirmed on appeal by the Supreme Court of that State.

2. Upon the judgment so obtained it caused an execution to be issued to the Sheriff of Hartford

County, in which county the Wiley Construction is located and does its business, and where presumably all of its property, if it has any, may be found.

3. This execution has been returned *nulla bona* and the judgment has never been paid.

4. It has discovered equitable assets that cannot be reached by execution, viz., unpaid subscriptions of a stockholder. This stockholder resides in New York City—out of the reach of any ancillary process that may issue from the Court wherein the judgment was obtained. The complainant cannot sue the Wiley Construction Company in the Courts of New York State, because those courts have no jurisdiction over controversies between two foreign corporations where the cause of action arose in another State (as in this case, where the cause of action arose in Connecticut).

See Sec. 1780, Code of Civil Procedure.

SECTION 1780. WHEN FOREIGN CORPORATIONS MAY BE SUED.

" An action against a foreign corporation may be " maintained by a resident of the State, or by a " domestic corporation, for any cause of action. " An action against a foreign corporation may be " maintained by another foreign corporation, or by " a non-resident, in one of the following cases only:

" 1. Where the action is brought to recover " damages for the breach of a contract, made " within the State, or relating to property situated " within the State, at the time of the making " thereof.

" 2. Where it is brought to recover real property " situated within the State, or a chattel, which is " replevied within the State.

" 3. Where the cause of action arose within the " State, except where the object of the action is to " affect the title to real property situated without " the State."

The question is, has the complainant exhausted its remedy at law sufficiently to authorize its application to a court of equity to reach these unpaid subscriptions? Defendant's counsel says no; he insists that the complainant should have obtained judgment in the courts of New York State against the company and issued execution thereon before he could maintain this suit. He contends that a judgment in a Connecticut court is for all purposes only a foreign judgment in an Circuit Court of the United States out of the District of Connecticut, and that an action of this character can be based only on a domestic judgment.

Appellant contends that the true rule in this class of cases is merely that the legal remedies should be exhausted; that the obtaining of a judgment and the issue of an execution and its return unsatisfied, is conclusive proof that the legal remedies have been exhausted, but IS NOT THE ONLY PROOF OF that fact, and that where it is shown to be impossible, as in this case, or even where it is useless, as in cases of notorious insolvency, a court of equity will not require a creditor to obtain a judgment before permitting him to follow the equitable assets of his debtor.

We believe that an examination of the authorities will confirm the reasoning and position of the appellant. The leading cases on this subject may be grouped as follows:

INSTANCE WHERE REDUCING THE DEBT TO JUDGMENT AND THE ISSUANCE OF AN EXECUTION AND ITS RETURN UNSATISFIED CONSTITUTE A CONDITION PRECEDENT TO THE FILING OF A CREDITOR'S BILL IN EQUITY.

In *Estes* vs. *Wilcox*, 67 *N. Y.*, 264, the plaintiff, who was a creditor at large of one Joshua Whipple, after the latter's death, intestate and insolvent, brought suit to have declared fraudulent and void as

against him a conveyance of real estate made in his lifetime by the decedent to the defendant. The judgment sustaining the demurrer to the complaint was upheld by the Court of Appeals, for the reason that the plaintiff had not complied with the general rule requiring that the debt must be ascertained by judgmeut, and that legal remedies must be exhausted before the creditor could proceed in equity for the collection of the debt out of assets liable in equity for its payment. The Court held that the plaintiff should have first brought his suit against the personal representatives of the debtor, to recover the amount of his claim. In such a suit, any defense which existed when the action was brought could be interposed and these questions could be settled between the creditor and the estate by the judgment and the creditor's action which the Court deemed it convenient and reasonable to require to be done before subjecting third persons to litigation with the plaintiff who might never be able to establish any claim against the estate.

See also *Adsit* vs. *Butler*, 87 *N. Y.*, 585.

INSTANCES WHERE THE OBTAINING OF JUDGMENT WAS PREVENTED BY OPERATION OF LAW, AND THEREFORE EXCUSED.

In *Shillington* vs. *Howland*, 53 *N. Y.*, 371, suit was brought against the defendant as a stockholder in the Penfield Paper Company, a corporation organized under the laws of the State of New York, to charge him with a debt of the company under the General Manufacturing Act of 1848.

Defendant claimed that the act required the perfecting of judgment against the corporation and the return of execution thereon unsatisfied, as a condition precedent to his liability. The plaintiff had commenced his action against the corporation, as required by the statute, but was prevented from

prosecuting it to judgment and execution, by reason of the operation of the Bankrupt Act of the United States, which stayed his suit. The Court held that the performance of the condition precedent required by the law, having been rendered impossible by the paramount law of the United States, the compliance with the condition was excused.

"It is enough," says the Court, "that without fault on the part of the plaintiff, the effect of judicial proceedings under a paramount law of Congress an action against the corporation was not only legally impossible, but if possible would have been fruitless," citing

3 Hill, 570.
6 *Wend.*, 386.
16 Barb., 541.

In *Kincaid* v. *Winelle*, 59 *N. Y.*, 548, the Court held as follows:

"If the position of the appellant, that the New York Soap Manufacturiug Company was *ipso facto* dissolved by the appointment of a Receiver, and was not thereafter capable of suing and being sued as a corporation, is well taken, it would seem to follow that the condition precedent to an action against the corporation having become impossible of performance by the act and operation of law, is no longer of force, and the creditor has his action at once against the stockholders, without the necessity of an attempt first to recover the debt of the corporation. The proceedings against the corporation are only required for the benefit of the stockholders, as a part of the immunity against a primary personal liability vouchsafed by law to the corporators, shielding them from action after a *bona fide* attempt has been made and exhausted to obtain payment from the corporate property. The judgment against the corporation is of no virtue or effect on an action against the stockholder, and is only evidence as proving the performance of the condition precedent.

INSTANCE WHERE NOTORIOUS INSOLVENCY WAS A SUFFICIENT JUSTIFICATION FOR A CREDITOR'S FILING A BILL IN EQUITY WITHOUT EXHAUSTING HIS LEGAL REMEDY.

Terry v. *Tubman*, 92 *U. S.*, 156, was an action brought by a creditor of the Bank of Augusta, Ga., against a stockholder to recover the value of certain circulating notes of the bank. The action was brought under a provision of the charter, which provided that the individual property of stockholders in the bank should be bound for the ultimate redemption of the bills issued by the bank, in proportion to the number of shares held by them respectively. The defendant, amongst other things, set up the Statute of Limitation as a defense, and the question before the Court was when the cause of action accrued in plaintiff's favor. It was held to have accrued when the bank became notoriously insolvent and unable to meet its liabilities. The Court said:

"We are of the opinion that it is not necessary "first to exhaust the assets of the bank by legal "proceeding. The case is not so much like that of "the guaranty of the collection of a debt, where "the previous proceeding against the principal "debtor is implied, as it is like a guaranty of pay- "ment where resort may be had at once to the "grantor, without a previous proceeding against "the principal. A judgment and execution un- "satisfied are evidences of insolvency, of inability "to collect. They are, however, evidence only; "and the fact may be established as well by other "evidence, among other modes, by the assignment "and continued suspension of business, or other "notorious indications."

INSTANCES WHERE A CREDITOR WAS PERMITTED TO FILE A BILL IN EQUITY TO REACH EQUITABLE ASSETS OF HIS DEBTOR, WITHOUT OBTAINING A JUDGMENT AGAINST THE DEBTOR BECAUSE (AS IN THE CASE AT

BAR) IT WAS IMPOSSIBLE TO OBTAIN SUCH A JUDGMENT.

In *McCartney* v. *Bostwick*, 32 *N. Y.*, 53, the facts facts are as follows:

The plaintiffs were residents of Missouri; one A. W. Bostwick, who was a resident of Minnesota, was debtor of theirs to the extent of four thousand dollars, and they had recovered judgment against him on the debt in the State of Minnesota, and execution of this judgment had been issued and returned *nulla bona*. Prior to the entry of judgment, Bostwick had purchased with his own property, in the name of his wife, some real estate in the State of New York, and this suit was begun to enforce a statutory trust in the real estate so purchased. The demurrer to the complaint (based upon the fact that no judgment had been obtained in the Courts of the State of New York against Bostwick on the debt) was overruled by the Court of Appeals. Judge Davis, in his opinion, amongst other things, says:

"The general principles that governed the Court "of Chancery in administering trusts of this nature "are applicable to this case. The case presented is "an anomalous one. There exists concededly, in "the farm held by respondent, a 'pure trust' in "favor of the appellants. But to reach and apply "this trust estate, a general rule of equity requires "that they should have exhausted their legal rem-"edy.

"The rule, of course, presupposed that they have "a legal remedy; but so far as the courts of this "State are concerned, they have none. The facts "stated by the complaint show that no remedy "whatever *at law* exists in their favor in this State. "That no court of law of this State has jurisdiction "to entertain a suit to be brought by them against "the debtor, either upon the judgment or the orig-"inal indebtedness, and that it is therefore impossi-"ble for them to recover judgment in this State, "and have their execution returned. (Code, Secs. "131, 227, 2 R. S., 3; 2 *Id.*, 5th Ed., 1871). Does

" equity demand that a legal remedy shall be ex-
" hausted, *where none exists,* before it will enforce
" a trust created by statute, of which it alone has
" jurisdiction? The rule fails where the reason for
" it ceases. ' *Cessante ratione legis cessat ipse lex,*'
" is a maxim as well in equity as at law. Courts of
" equity ' have adopted principles exceedingly broad
" and comprehensive in the application of their
" remedial justice, and especially where there is any
" fraud touching property they will interfere and
" administer a wholesome justice, and sometimes
" even a stern justice, in favor of innocent persons
" who are sufferers by it without any fraud on their
" side ' (2 Story Eq., 1265). It is their special pro-
" vince to enforce trusts of this nature, and it would
" be a reproach to their justice if they demanded as
" an unbending condition, that a creditor shall have
" exhausted remedies at law, which as between the
" parties before them have no existence whatever."

" But if it be essential to jurisdiction in this case,
" I am prepared to go farther, and hold that the
" remedy of the plaintiffs at law has been ex-
" hausted in this case, within the true meaning of
" the rule. So far as the effect of the judgment is
" to establish the indebtedness, it has been acccom-
" plished by the judgment recovered in Minnesota.
" That judgment appears to have been recovered
" upon personal service of process. It is equally as
" conclusive upon the courts of this State, as to
" the existence of *the debt and its amount*, as a like
" record from one of our own courts would be.
" (*Shumway and others* v. *Stillman*, 6 *Wend.*, 447;
" *Reed* v. *Pratt*, 2 *Hill*, 64; Const. U. S., Art. 4,
" Sec. 1.) Of course it is no lien upon property
" here, but a lien is not essential, nor could any
" judgment against the debtor be a lien upon this
" trust estate, as *Garfield* v. *Hatmaker* (*ubi sup.*)
" expressly decides. Since, then, no statute con-
" trols it, as in ordinary creditors' bills, and no
" action or legal proceeding whatever can be
" brought in this State, either upon the original
" debt or the judgment, the Court must look at the
" facts stated to ascertain if all remedy at law has
" not been exhausted. In this view of the case
" there was a remedy at law against the debtor;
" but where? Only in the courts of a sister State;
" and that is shown to have been followed to its

" ultimate results. Conceding it must also be re-
" peated here in a case where it may be, yet when
" that is shown to be impossible under our law, it
" inevitably follows that the law is exhausted. Our
" law is not, therefore, subject to the reproach of
" creating by statute a trust for foreign creditors in
" property within our State, yet withholding from
" them all power of reaching and applying it."

National Tradesmen's Bank vs. *Wetmore*, 124 *N. Y.*, 241, decided in January, 1891, was an action brought to set aside as fraudulent a deed from Abner C. Wetmore through a third person to his wife, the defendant therein, and for a sale of the lands described therein, in order to pay a debt due plaintiff from the said Abner C. Wetmore.

The facts were as follows: Between August 20, 1882, and December 28, 1882, Abner C. Wetmore, a resident of the County of New Haven, Connecticut, became indebted to plaintiff, a resident of the same place, in $5,869.07. December 28, 1882, Wetmore conveyed to one Campbell, without consideration, an undivided one-third interest in 11,230 acres of land in the County of Hamilton, in the State of New York, and he, on the same day, assumed to convey, without consideration, the same land to the defendant.

February 19, 1883, Wetmore made a general assignment of all his property to Eli Ives of the County of New Haven, State of Connecticut, for the benefit of creditors. The assignment was duly recorded the same day, and the assignee accepted the trust, and his appointment was confirmed by the Court of Probate, and he became the legal and acting assignee, and so continued until April 19, 1883, when he resigned, and Charles P. Ives of the County of Hartford, Connecticut, was duly appointed substituted trustee of the assigned estate, whereupon he accepted the trust, duly qualified, and entered upon the discharge of his duties as assignee.

The plaintiff began actions against Abner C. Wetmore in the courts of Connecticut, for the recovery of the sums due to him, and was engaged in prosecuting them when in June, 1883, Wetmore died intestate, and in October, 1883, Charles P. Ives (the substituted assignee), was duly appointed administrator of the intestate's estate, accepted the trust and has ever since remained the legal and acting administrator and assignee of said estate.

Under the statutes of Connecticut, actions for the recovery of money due on contract may be revived and prosecuted against the personal representative of a solvent's estate; but if the estate be insolvent, the Court of Probate may adjudge that no action except to recover debts due the United States, the State of Connecticut, the expenses of the decedent's last sickness or of his funeral charges, shall be prosecuted. Pursuant to this law, that Court on the 27th of December, 1883, adjudged that the intestate's estate should be settled as an insolvent one, and that the plaintiff's actions should be discontinued, and they were. By the statutes of Connecticut, commissioners are appointed by the Probate Court to adjudge and determine claims presented against insolvent estates, pursuant to which commissioners were appointed to determine the claims due from the estate of said Wetmore, and it was adjudged by them that there was due to the plaintiff from the estate on the 24th of November, 1883, the sum of $6,177.64. The assets of the estate were insufficient to pay the expenses of settling it and the preferred claims.

Thereupon, the plaintiff brought this action in the Supreme Court of the State of New York to set aside as fraudulent the deed first above described.

A judgment dismissing the complaint was reversed by the Court of Appeals. The opinion of that Court, per Bradley, *J.*, is as follows:

"The question *in limine* is whether the plaintiff "had any standing in court to enable it to attack,

"as fraudulent against the creditors of the grantor, "the conveyance made by Abner C. Wetmore to his "wife, the defendant, through a third person, of the "land in question situated in this State; and that "proposition arises on the fact that no execution "had been issued and returned unsatisfied founded "upon any judgment recovered by the plaintiff upon "the debt due to it from such grantor. The action "certainly could not, as a creditor's bill, under the "statute be maintained, because recovery of a judg- "ment and the return unsatisfied of an execution "issued upon it, are essential prerequisites for that "purpose. (2 R. S., 173, Sec. 38; Code, Sec. 1871). "And it has become the settled rule in this State "not to dispense with those preliminary proceedings "at law, although it may be made to appear by evi- "dence that no benefit could result to the creditor from "them. (Estes *v.* Wilcox, 67 N. Y., 264; Adsit *v.* But- "ler, 87 *Id.*, 585). This is not founded upon any pur- "pose of the statute to repeal or curtail the common "law equity powers of the Court, not inconsistent "with the statute, to investigate the conduct of "debtors in respect to their property in fraud of "creditors, and to grant relief. The statute did not "purport to do that, but provided that 'the powers "and jurisdiction of the Court of Chancery are co- "extensive with the powers and jurisdiction of the "Court of Chancery in England, with the excep- "tions, additions and limitations created and im- "posed by the Constitution and laws of this State.' "(2 R. S., 173, Sec. 36). In some of the States the "issue and return of execution preliminary to the "action in equity is not required when it clearly "appears that it would be utterly fruitless; and the "same doctrine has been declared in the United "States Supreme Court (Case *v.* Beauregard, 101 U. "S., 690). The rule in this State, in some sense "limiting the exercise of jurisdiction of the Court "so as to bring within its application all cases hav- "ing in their purpose or relief sought, the nature of "statutory creditor's bills does not necessarily rest "upon a want of equitable power of the Court or "its denial, but rather is adopted as a rule governing "and regulating the exercise by the court of juris- "diction within its equitable powers. It has the "merit of uniformity, and in effect relieves a case "from any uncertainty as to what would have re-

"sulted from the use of an execution if one had "been issued. And it is founded upon the "doctrine that a court of equity will not "take cognizance of a controversy which can "be determined at law, and not until the remedy "there is exhausted. Such has quite uniformly been "the rule of the common law applicable to equitable "jurisdictions (M'Dermutt *v.* Strong, 4 John. Ch., "687; Hadden *v.* Spader, 20 John., 554). But this "rule is not so unrelenting as to deny to a party the "interposition of the equity powers of the Court "when the situation is such as to render impossible "the aid of a court of law, to there take the prelim- "inary steps and produce what ordinarily may be "treated as a condition precedent to the application "for equitable relief. This seems to be the position "of the plaintiff in its relation to the remedy which "it seeks by this action. The plaintiff is a bank in "the State of Connecticut, and Abner C. Wetmore, "who also resided there, was indebted to it. He "became insolvent and made an assignment for the "benefit of his creditors to a person residing in that "State. The plaintiff commenced actions there to "recover judgments on such debts against Wetmore, "who died while they were pending, and the "assignee was appointed administrator of his estate. "The plaintiff sought to revive and continue the "actions against the administrator, and thereupon "the latter, as permitted by the law of that State, "filed a plea in abatement, alleging that the estate "of Wetmore was an insolvent estate in the course "of settlement in the Probate Court; and that the "plaintiff's causes of action were not for debts due "the United States, or the State of Connecticut, "or for the expenses of his last sickness "or funeral charges. The Court in which "those actions were pending, found that the alle- "gations in abatement were true, and directed "that the actions abate and be dismissed. This was "a denial, pursuant to the law of Connecticut, of "any right of the plaintiff to continue or maintain "any there against the administrator; and the only "determination he could have of the claim against "the estate was through the action taken in that "respect by the Probate Court, in which jurisdic- "tion, exercised in the manner provided by statute,

" was exclusive. According to the prescribed prac-
" tice, that court appointed commissioners in insol-
" vency upon Wetmore's estate, to whom the plain-
" tiff's claim was presented, and they, by their
" report, allowed it at the sum of $6,177.74. This
" determination of the commissioners became con-
" clusive and binding upon the trustee as effectually
" as if it had been a recovery by action against him
" in a court of law (Loomis *v.* Eaton, 32 Conn.,
" 550; Bailey *v.* Bussing, 37 *Id.*, 349; First National
" Bank *v.* Hartford Life, &c., Ins. Co., 45 *Id.*, 22).
" Nothing more remained for the plaintiff do do in
" that State. There was a small amount of preferred
" claims, while those unpreferred amounted to up-
" wards of $28,000, and the assets were insufficient
" to pay the expenses of the settlement of the estate
" and the preferred claims. The trial Court finding
" these facts also found that the conveyance before
" mentioned was made by Wetmore after his in-
" debtedness to the plaintiff accrued, and was made
" without consideration and with the intent to de-
" fraud his creditors; and that at the time of his
" death Wetmore had no title to any property real
" or personal in the State of New York. The
" case presented is one in which the plain-
" tiff could recover upon his claim no judgment en-
" titling him to have an execution issued and re-
" turned. It is not, therefore, a case within the
" contemplation of the statute relating to creditor's
" actions, and the support of the action is dependent
" upon the common-law powers of the court of
" equity. They not being taken away by the statute
" no reason appears why they are not available to
" give a party situated as the plaintiff is, a standing
" in court (Chautauqua County Bank *v.* White, 6
" N. Y. 236; Scott *v.* M'Millen, 1 Littel, 302; 13 Am.
" Dec., 239). The subjects of fraud and trusts are
" peculiarly matters of equity jurisdiction, which is
" very comprehensive where the other tribunals
" cannot afford relief, and its want of it is not to be
" inferred from the novelty of questions presented,
" (Hadden *v.* Spader, 20 Johns, 564; Lining *v.* Ged-
" des, 1 McCord's Ch., 304; 16 Am. Dec.; McCal-
" mont *v.* Lawrence, 1 Blatch., 232).

"In Adsit *v.* Butler, the principal applicable to
" equitable suits to reach property disposed of in

"fraud of creditors, upon which the practice is "founded, is recognized to be that the remedy at "law must first be exhausted, and reference is made "to Bank *v.* Olcott (46 N. Y. 18), where the rule is "well stated. And it is upon that principle that "such requirement in the nature of a condition "precedent must be observed before seeking relief "in equity. But when a party has done all that "is possible for him to do to prepare the way for "his case to equitable cognizance, he is not to "be denied access to the only tribunal capable "of granting relief merely because he had proceeded "no further than he was, without any fault or "laches on his part, permitted to go. That would "be repugnant to the maxim that 'there is no "'wrong without a remedy.' And while that "maxim is not absolutely true, it expresses a prin-"ciple, and it is for that rather than precedent that "courts will seek in considering whether any or "what remedy may be had in the administration of "justice.

"And analogously applicable to the question un-"der consideration is the doctrine announced in "Shellington *v.* Howland (53 N. Y., 371); Kincaid *v.* "Dwinelle (59 *Id.*, 548) to the effect that when the "right to recover a judgment against a corporation "and the issue and return of execution, which a "condition precedent to the liability of the stock-"holder under the statute (L. 1848, Chap. 40, 89 "N. Y., 334) is defeated without fault of the creditor, "the condition precedent is dispensed with. In "Shellington *v.* Howland is cited Loomis *v.* Tifft "(16 Barb., 541), which may not be in harmony "with the later cases, but the question as there de-"cided was applicable in principle to that in the case "in which it was cited. That principle is broad "enough to embrace within it for the purpose of "remedy the variety of cases to which it may be "applicable. The statute provides that an action "may be brought by executors, administrators, "assignees or other trustees to reach prop-"erty transferred in fraud of creditors (L. "1858, Ch. 314), yet if such officer or "trustee refuses to do so, a creditor ben-"eficially interested may bring the action, includ-"ing in it as a party defendant, him so refusing.

"This is upon the principle of the maxim before "mentioned (Harvey *v.* McDonnell, 113 N. Y., 526). "And this rule prior to that statute was applicable "to an action by a creditor of a deceased debtor "represented by an executor or administrator "(Bate *v.* Graham, 11 N. Y., 237; Hagan *v.* Walker, "14 How. U. S., 29). For the purpose of such an "action by a creditor no judgment or execution is "preliminarily essential (Harvey *v.* McDonnell, "*supra*).

"The plaintiff's debt was as much the subject of "adjudication as it could be made so in in the State "of Connecticut, and as effectually against the ad- "ministrator as if rendered by a court of law. The "denial to the plaintiff of equitable relief cannot "therefore under the circumstances rest upon the "fact that he had no judgment in such court execu- "tion thereon and its return unsatisfied.

The cases cited above furnish a fair illustration of the many various instances where a court of equity has afforded a creditor relief, when the usual condition precedent of judgment obtained and execution returned *nulla bona* has not been complied with, and from an examination of these cases it is not difficult to deduce the correct general rule that should govern a court of equity in deciding whether to entertain a so-called creditor's bill. It is this: The complainant must do all that he can at law to obtain his rights; if he is then still without remedy, a court of equity will entertain his case. The rule is thus stated in Case *v.* Beauregard, 101 U. S., 688:

"It is, no doubt, generally true, that a creditor's bill, to subject his debtor's interest in property to the payment of the debt, must show that all remedy at law has been exhausted. And, generally, it must be averred that judgment has been recovered for the debt; that execution has been issued, and that it has been returned *nulla bona*. The reason is that until such a showing is made, it does not

appear, in most cases, that resort to a court of equity is necessary, or in other words, that the creditor is remediless at law. In some cases, also, such an averment is necessary to show that the creditor has a lien upon the property he seeks to subject to the payment of his demand.

The rule is a familiar one, that a court of equity will not entertain a case for relief where the complainant has an adequate legal remedy. The complaining party must, therefore, show that he had done all that he could do at law to obtain his rights.

But, after all, the judgment and fruitless execution are only evidence that his legal remedies have been exhausted, or that he is without remedy at law. They are not the only possible means of proof. The necessity of resort to a court of equity may be made otherwise to appear. Accordingly the rule, though general, is not without many exceptions. Neither law nor equity requires a meaningless form. '*Bona, sed impossibilia non cogit lex.*' "

It is true that in Claflin *vs.* McDermott (12 Fed. R., 375) and Walser *vs.* Seligman (13 Fed. R., 415) it was held that a creditor's suit is ancillary; that it cannot stand alone, but must depend upon an original suit at law, and that such original suit at law must have been prosecuted to judgment within the jurisdiction wherein the equity suit is brought, and the judgment must have been uncollectible by the ordinary processes of law before the assistance of a court of equity may properly be invoked.

But these decisions of Judge Wallace are directly contrary to the law as elsewhere expounded, as we have above attempted to show, and their soundness has been questioned by Judge Wallace himself in his opinion in this case, where he says, referring to them: "As those cases were decided by me, I feel free to say that I doubt whether they do not adopt a too technical view of the right

of a creditor whose judgment has been obtained against his debtor at the place of his domicile and whose execution has been issued there and returned unsatisfied, to maintain a creditor's bill in a Court of another State; and I may be permitted to express the hope that the present case may be taken to the Supreme Court for review."

Page 8 of the Record.

IV.—ALL THE FACTS REQUISITE TO GIVE A COURT OF EQUITY JURISDICTION OF THIS CASE APPEAR IN THE BILL OF COMPLAINT.

The allegations of the complaint are digested in the Statement of Fact at the head of this Brief.

The Bill of Complaint will be found at pages 1 to 3 of the Record.

V.—It was contended in the Court below by the appellee that the complainant had a complete remedy at law, because the bill sought to reach "the sum remaining unpaid upon a subscription to the capital stock of a corporation, made by a person within the county," which sum was subject to attachment and execution by the very language of Section 646 of the New York Code of Civil Procedure.

It is sufficient answer to this contention to repeat what we have already shown, that the Courts of New York would have no jurisdiction of a suit that might be brought by the complainant against the Wiley Construction Company, *wherein alone such an attachment could be obtained.*

VI.—The complaint is otherwise sufficient.

This action has been begun upon the authority of Hatch against Dana, 101 U. S., 205; and the bill of complaint herein is modeled upon the bill of complaint in that suit, and the sufficiency of it is supported thereby.

The facts in the case of Hatch against Dana are: Dana had recovered a judgment against the Chicago Republican Company, a corporation organized and existing under the laws of the State of Illinois, for $6,419.17, and an execution upon the judgment had been returned unsatisfied. Thereupon Dana, on behalf of himself and all other creditors who might come in, filed his bill in equity against the company, Hatch, Williams and other resident stockhodlers averring the incorporation of the company with a capital stock of $500,000 divided into shares of $100 each; that at a meeting of the incorporators certain stock subscriptions were made, Hatch and Williams each subscribing for one hundred shares; that a complete organization of the company was effected and an assessment of 20 per cent. declared upon the stock subscribed, the company thereupon commencing business; that 80 per cent. of the subscription to stock so made still remained unpaid; that the company had ceased to do business and was wholly insolvent; avers the recovery of the judgment, issue and return of execution unsatisfied, and prays that *upon an accounting of the amount unpaid upon the stock subscriptions of the stockholders named as defendants, they may be decreed to pay so much of the balance found unpaid on their respective subscriptions as will be sufficient to pay the ascertained debts of the company, including the judgment aforesaid,* and for general relief.

The complaint in that action is substantially the same as that in the suit now before the Court, and the relief prayed for is identical in both suits.

A decree was rendered that the complainant Dana recover of Hatch and Williams the amount of his judgment against the company, and upon appeal this decree was affirmed.

VII.—The decree of the Circuit Court sustaining the demurrer and dismissing the bill should be reversed.

W. J. CURTIS,
Counsel for Appellant.

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United States Supreme Court.

OCTOBER TERM, 1892.

THE NATIONAL TUBE WORKS COMPANY, APPELLANT,

v.

GEORGE WILLIAM BALLOU, APPELLEE.

No. 70.

W. J. CURTIS,
For Appellant.

United States Supreme Court.

OCTOBER TERM, 1892.

THE NATIONAL TUBE WORKS COMPANY, APPELLANT,

v.

GEORGE WILLIAM BALLOU, APPELLEE.

No. 70.

Additional Memoranda Filed by Appellant.

The suggestion of defect of parties defendant comes too late and will not be heard at this stage of the case.

Had the intimation been made below that the addition of a nominal party was necessary it might have been made at once by amendment, and the demurrer sustained as to the other features of the case. It would be a manifest injustice to hold that a defect that could have been cured below if pointed out can be relied upon on appeal to dismiss the bill.

In Livingston *v.* Woodworth (15 Howard, 557) Justice Daniel says:

"In the case before us the objection of misjoinder of the plaintiffs nowhere appears upon the pleadings, nor for aught that is disclosed was it insisted upon even at the

hearing; it is urged for the first time after the hearing and after a final decree, and to allow this objection at so late a stage of the proceedings would be a surprise upon the appellees and might operate the most serious mischiefs. * * * As to this objection, we think it comes too late to be of any avail, and should not affect the cognizance of the court, either as to the parties or the subject-matter of the controversy."

In Dwight *v.* The Central Vermont Railroad Company (9 Federal Reporter, 785) it was held that a demurrer to the bill on account of defect of parties was insufficient that did not specify the necessary parties.

Whether such be the correct rule in this case or not, it would be a salutary one in any case, as it would enable the complainant to amend if necessary, or to be prepared to sustain the omission of the party from the pleading.

It has been repeatedly held in common law cases that the court on appeal will not consider a point not brought to the attention of the court below, and passed upon directly or indirectly.

Wood *v.* Weimar, 104 U. S. 795.
Morrill *v.* Jones, 106 U. S. 467.
Pacific Railroad Removal cases, 115 U. S. 17.

In the latter case the court on appeal refused to consider the fact that the petition for removal was not verified, claiming that as the attention of the court below had not been called to it the objection was waived.

The corporation is not a necessary party.

Wellman *v.* Howland Coal and Iron Works, 19 Fed. Reporter, page 51.

This was a motion to remand, which was determined by the relation which the Howland Coal and Iron Works, a corporation, bore to the litigation. The suit sought to

make the defendant Small liable for his unpaid subscription to the company's stock to the extent, at least, of complainant's debt. The court held that the company was only a nominal party, if a party at all.

In Walser *v.* Seligman, cited by Judge Wallace in his opinion in this case, he says:

"The corporation is not made a party to the suit, but its presence can be dispensed with and adequate relief granted in its absence, as it has not such an interest in the subject of the suit that a decree without prejudice to its rights cannot be made. Sufficient reasons for not making it a party are found in the fact that it is beyond the jurisdiction of this court, and also in the fact that it is practically defunct."

In Marsh *v.* Burroughs *et al.* (1 Woods, 465), Justice Bradley sustained a creditor's bill similar in character to this, to which the corporation bank was not a party, nor its receivers nor assignee.

But in cases where necessary parties are without the jurisdiction, and the cause may be finally decided without their presence, it has been repeatedly held that they may be dispensed with in the circuit court if without the reach of process.

Traders' Bank *v.* Campbell, 14 Wall. 87.
Mallow *v.* Hinde, 12 Wheat. 193.
Milligan *v.* Milledge, 3 Cranch, 220.
Elmendorf *v.* Taylor, 10 Wheat. 152.

In the latter case Chief-Justice Marshall held:

"The rule which requires that all persons concerned in interest, however remotely, should be made parties to the suit, though applicable to most cases in the courts of the United States, is not applicable to all. In the exercise of its discretion the court will require the plaintiff to do all

in his power to bring every person concerned in interest before the court. But if the case may be completely decided as between the litigant parties the circumstance that an interest exists in some other person whom the process of the court cannot reach, as if such party be a resident of some other State, ought not to prevent a decree upon its merits. It would be a misapplication of the rule to dismiss the plaintiff's bill because he has not done that which the law will not enable him to do."

In Hatch *v.* Dana, *supra*, the corporation, although a party originally, was not before the court when the decree was entered, showing that the court could settle the equities between a stockholder and the creditor without the presence of the corporation.

The rule above stated was doubtless the foundation for section 737 of United States Revised Statutes, which says, among other things, that " non-joinder of parties who are not inhabitants of, nor found within, the district as aforesaid, shall not constitute matter of abatement or objection to the suit."

In this case the Wiley Construction Company is a corporation organized under the laws of the State of Connecticut, and is therefore not domiciled within the judicial district in which this suit was brought.

Rule No. 47 of the rules of the Supreme Court also applies in this case. It is as follows:

" In all cases where it shall appear to the Court that persons who might otherwise be deemed necessary or proper parties to the suit cannot be made parties by reason of their being out of the jurisdiction of the Court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the Court as to the parties before the Court, the Court may, in their discretion, proceed in the cause without making such persons parties, and in such cases the decree shall be without prejudice to the rights of the absent parties."

If it should be suggested that rule 22 applies, and that only deals with the matter of form, the decision of the Court in the Pacific Railroad removal cases, above cited, would apply.

On this point, if the Court should hold that the corporation should in any event be made a party, the cause should be remanded to the circuit court with leave to the appellant to amend the complaint so as to conform to rule 22, and make the corporation a party even though service cannot be obtained upon it within the jurisdiction.

The opinions in the cases of Claflin *v.* McDermott and Walser *v.* Seligman, referred to in the opinion rendered by Judge Wallace in this case, are printed in full below.

CIRCUIT COURT, SOUTHERN DISTRICT NEW YORK.

JUNE 14, 1882.

CLAFLIN AND OTHERS

v.

McDERMOTT AND OTHERS.

Vanderpoel, Green & Cuming, for plaintiffs.
E. R. Meade, for defendants.

WALLACE, *C. J.*:

The bill in this case is filed to set aside the transfer of certain personal property made at San Francisco, California, by Kennedy & Durr, to McDermott, by means of collusive judgments and sales under executions issued thereon, the complainants being creditors of Kennedy & Durr, and having recovered judgment in a State court in California against Kennedy & Durr, upon which an execu-

tion has been returned unsatisfied. By a demurrer, the question is presented whether the bill can be maintained here, no judgment having been obtained or execution issued in this court, or in any court of the State. Actions like the present, in aid of the execution at law, are ancillary to the original suit, and are, in effect, a continuance of the suit at law to obtain the fruit of the judgment or to remove obstacles to its enforcement. Because this is the nature of such an action, it has been decided that such a suit may be maintained in a Federal court although all the parties reside in the State where it is brought, the judgment in the original suit having been recovered in the Federal court in which the creditor's suit was brought. (Hatch *v.* Dorr, 4 McLean, 112.) It is, therefore, difficult to understand how such a suit can be maintained in any court which does not exercise an auxiliary jurisdiction over the court in which the original suit was brought. Authorities are found, however, upon both sides of the question which is thus presented.

In *Tarbell* v. *Griggs* (3 Paige, 207) the court of chancery of this State refused jurisdiction of a creditor's bill filed to obtain satisfaction of a judgment obtained in the United States circuit court for the southern district of New York, upon which an execution had been returned unsatisfied. The judgment was treated as a foreign judgment, and as standing on the same footing with a judgment of the court of another State.

In *Davis* v. *Bruns* (23 Hun. 648) there was a similar adjudication. There the plaintiff brought his action in the supreme court of this State to set aside an alleged fraudulent transfer of real estate, having obtained a judgment against the grantor in the United States district court for the southern district of New York, and an execution on the judgment having been returned unsatisfied.

In both of these cases it was held that the plaintiff's remedy at law had not been exhausted by the issuing and return of an execution upon a foreign judgment.

On the other hand, in *Wilkinson* v. *Yale* (6 McLean, 16), a creditor's bill was maintained in the United States circuit court, founded upon a judgment of a State court of the State in which the Federal court was sitting. The decision was placed upon the power of the court to adopt a remedy given by the law of the State, when the remedy was one appropriate for the exercise of a court of equity; but it was also assumed that the bill could be maintained irrespective of the State statute.

The cases in the courts of New York seem most consonant with principle. Obviously, the complainants are merely creditors at large of the defendants in the California judgment. The judgment of another State has no force in this save what it derives from the laws of this State and the provision of the Constitution of the United States which relates to its effect as evidence. It ranks here as a simple contract debt. It does not have the force and operation of a domestic judgment, except for the purposes of evidence, beyond the jurisdiction where it is obtained. (*McElmoyle v. Cohen*, 13 Pet. 312.) It will not be contended that a creditor at large can invoke the jurisdiction of equity to enforce his claim unless upon some of the recognized grounds of trust or administration of equitable assets. Unless some of these grounds exist the remedy of the creditor is at law; and equity will not assist him until that remedy is exhausted. The remedy at law cannot be exhausted by the recovery of a judgment in a foreign jurisdiction, and by fruitless efforts to enforce it there. Except as a binding adjudication between the parties upon the subject-matter of the suit, the judgment of one

of our sister States has no operation here upon the rights or the remedies of the parties to it. It cannot be a foundation for a creditor's bill here any more than a judgment recovered in England or in Canada. It must be sued over here before it becomes a judgment for the purposes of any remedy here at law or in equity.

This conclusion is reached with less reluctance in view of the practical objections which would exist if foreign judgment creditors were permitted to resort to this jurisdiction to remove obstacles in the way of their legal remedies. These obstacles always exist in the jurisdiction where the judgment is obtained. Frequently, their removal involves the consideration of the force and effect of remedies and rights created by local law which are more appropriately adjudicated by the local tribunals. The present case affords an illustration in point. This court is asked to examine into a fraudulent perversion of the proceedings of a court of a distant State, and set aside transfers based upon these proceedings, when the actors, the transactions, and the property are all within that State. Such a jurisdiction should not be willingly assumed.

The demurrer is sustained.

CIRCUIT COURT, SOUTHERN DISTRICT, NEW YORK.

September 7, 1882.

WALSER AND OTHERS

v.

SELIGMAN AND OTHERS.

George P. Newell, for complainants.

Evarts, Southmayd & Choate, for respondents.

WALLACE, *C. J.*:

This bill must be dismissed because the complainants have not exhausted their remedy by legal process, a point which was not presented or considered when this cause was before my predecessor in this court upon demurrer. The complainants are creditors and stockholders of the Memphis, Carthage & Northwestern Railroad Company, a corporation organized under the laws of the States of Missouri and Kansas, and file this bill in behalf of themselves and all other creditors and stockholders who may desire to join, to enforce a liability of the defendants as holders of 60,000 shares of unpaid capital stock of the corporation. The corporation is not made a party to the suit, but its presence can be dispensed with, and adequate relief granted in its absence, as it has not such an interest in the subject of the suit that a decree without prejudice to its right cannot be made. Sufficient reasons for not making it a party are found in the fact that it is beyond the jurisdiction of this court, and also in the fact that it is practically defunct. And it is only because the corporation is practi-

543; *State Savings Ins.* v. *Kellogg*, 52 Mo. 583; *Perry* v. *Turner*, 55 Mo. 418), and certainly it can have no more vitality here than it has in the sovereignty that created it, and from which it cannot migrate.

On the other hand it cannot be doubted that a corporation is capable of being sued until it is formally dissolved, and it will not be seriously contended that the futility of the proceeding will justify a relaxation of the strict rule requiring the creditor to exhaust his legal remedy. It does not follow because a corporation is so far *in nubibus* that it need not be made a party to an action that a creditor will be excused from pursuing it at law before resorting to a creditor's bill. If a creditor's bill can be maintained in this jurisdiction whenever it appears that the debtor has no leviable property, and, like this corporation, is moribund, it can be also when the debtor is shown to be beyond the reach of the process of the court. It would doubtless be convenient for creditors in many instances if they were permitted to maintain a creditor's bill upon such a theory, but in the absence of legislation, or any satisfactory precedent, the right to do so cannot be recognized.

The bill is accordingly dismissed.

W. J. CURTIS,
Counsel for Appellant.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1892.

TERM No. 70.

THE NATIONAL TUBE WORKS COMPANY,

Appellant,

vs.

GEORGE WILLIAM BALLOU.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR GEORGE WILLIAM BALLOU RESPONDENT.

THOMAS THACHER,

Counsel.

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The bill is accordingly dismissed.

W. J. CURTIS,
Counsel for Appellant.

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THOMAS THACHER,
Counsel.

O. B. Bergoyne, Walker and Centre Sts., N. Y.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1892.

TERM No. 70.

THE NATIONAL TUBE WORKS COMPANY,
Appellant,

vs.

GEORGE WILLIAM BALLOU.

APPEAL FROM CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR RESPONDENT.

This is an appeal by complainant from a decree of the Circuit Court of the United States for the Southern District of New York, dismissing the bill of complaint, with costs, upon defendant's demurrer (Record, p. 9).

Complainant sued in behalf of itself and such other creditors of the Wiley Construction Company as might come in; *the respondent is the sole defendant.*

The bill—allegations of citizenship, &c., being passed by—alleges substantially as follows:

> That the Wiley Construction Company was organized in 1880 under the laws of Connecticut, its capital stock being fixed at $500,000, immediately

entering upon its business and continuing it until July, 1883, the defendant being active in its management.

That at the outset defendant subscribed for and agreed to pay for, at par, $249,900 of the stock; and has never paid anything on account thereof.

That complainant sold and delivered to said construction company certain goods; payments were made on account; and finally, for balance of indebtedness therefor, the construction company in March, 1883, delivered to complainant its promissory note for $49,828.37 and interest, payable on demand; payment was afterwards demanded, but no part has been paid.

That in October, 1886, complainant recovered judgment against said construction company, on said note, for $52,041.51, defendant appearing, *in the Superior Court of Connecticut*, a court of competent jurisdiction, in Hartford County, in said State; which judgment was affirmed on appeal by the Supreme Court of Errors of said State.

That thereafter execution was issued out of said Superior Court against the property of said construction company, *to the Sheriff of said Hartford County*, in which its principal office is, and has been returned wholly unsatisfied.

That the whole amount of said judgment is still due and unpaid.

That said construction company has no fund or assets wherewith to pay complainant's claim.

Record, pp. 1–3.

The bill prays:

"That an accounting be had of the amount unpaid upon the stock subscription of the said defendant in the Wiley Construction Company, and that said defendant be decreed to pay so much of

the balance found unpaid on his subscription as will be sufficient to pay such debts of said corporation as may be proved in this suit, including the judgment aforesaid, in favor of your orator.

"Also, for other and further relief, generally."

Record, p. 3.

A general demurrer for lack of equity, &c., was interposed.

Record, p. 7.

POINTS.

I.

A judgment at law and an execution returned unsatisfied are necessary to the jurisdiction of equity to entertain an ordinary creditor's bill to reach equitable assets of a debtor.

There is a class of creditor's bills the purpose of which is to remove obstacles which prevent a creditor from making effectual a lien upon property obtained by judgment and execution, or by judgment alone at law. This bill does not belong to that class. The judgment, or the judgment and execution in Connecticut certainly did not give complainant a lien upon the debt of Ballou to the debtor company.

The theory that capital stock is a trust fund, perhaps, gives to creditors of corporations peculiar rights, which form the basis of peculiar suits. The application of this theory will be considered later.

Under this point the bill is regarded as an ordinary creditor's bill, the purpose of which is to reach and apply to the payment of debt, equitable assets, that is

assets which cannot be reached by execution at law, the principles concerning which are the same whether the debtor is an individual or a corporation.

As to such bills, it is settled by authority that there must be shown a judgment and an execution at law returned unsatisfied. The jurisdiction of equity is ancillary only; and exists only when legal processes have been exhausted.

In Webster vs. Clark, 25 Me., 313, the Court say, and Mr. Justice HARLAN, in Taylor vs. Bowker, 111 U. S., 110, quotes its language, as follows:

"Courts of equity are not tribunals for the collection of debts; and yet they afford their aid to enable creditors to obtain judgment, when their legal remedies have proved to be inadequate. It is only by the exhibition of such facts as show that these have been exhausted that their jurisdiction attaches. Hence it is that, when an attempt is made by process in equity to reach equitable interests, choses in action, or the avails of property fraudulently conveyed, the bill should state that judgment has been obtained, and that execution has been issued, and that it has been returned by an officer without satisfaction."

In Parish vs. Lewis, Freeman Ch. R., 299, 306, Chancellor BUCKNER says: "Now, I understand the rule to be this: If you wish to reach legal assets of your debtor, and to remove obstacles which obstruct your course at law, it is sufficient that you show a judgment creating a lien on those assets; but if you wish to reach equitable assets or other things not subject to execution at law, you must show that you have exhausted your remedies at law, by the return of an execution unsatisfied, as the foundation of your right to come into this Court. In such cases the complainant's right to relief in this Court depends upon his having run his execution at law without having been able to satisfy his judgment. It is not a mere technical objection, but goes to the very foundation of the suit.

* * * The complainant must show an execution returned unsatisfied, *and no state of factz will excuse such a return.*"

In Brinkerhoff vs. Brown, 4 Johns. Ch., 671, Chancellor KENT says:

> "If they want relief touching the personal assets of their debtor, they must show that they have taken out *execution at law* and pursued it to every available extent against the property before they can resort to this Court for relief. I apprehend this to be the settled rule in chancery, and that this Court does not, as of course, assume jurisdiction in taking executions upon judgments at law into its own hands. Such power would be oppressive to the debtor and to the Court. The presumption is that the Court which renders judgment is competent to enforce it; and it is only in special cases, in which property cannot be found to satisfy it, that this Court interferes to discover and reach the property. *But the legal remed by execution must first be tried. This Court is not to know, by anticipation, that it will be ineffectual.* Upon such an allegation, it might assume the collection of all simple contract debts, in the first instance, without even requiring the creditor to prosecute his demand to judgment at law."

In Dunlevy vs. Tallmadge, 32 N. Y., 457, the New York Court of Appeals say:

> "A creditor at large has no *status* in the court [court of equity]; and the right of a judgment creditor to relief depends upon the fact of having exhausted his legal remedies without being able to obtain satisfaction of his judgment. An execution must have issued on the judgment, and been returned unsatisfied. *This is essential to the*

jurisdiction of the Court, though there be nothing that can be reached by execution at law."

And this position is fortified by many authorities cited.

Says Chief-Justice WAITE, in *Terry vs. Anderson*, 95 U. S., 628 :

> " Ordinarily, a creditor must put his demand into judgment against his debtor, and exhaust his remedies at law before he can proceed in equity to subject choses in action to its payment."

The possible exception to which he then refers is based upon the trust-fund theory in the law of corporations, which will be considered later. The Chief-Justice found that any rights based solely upon such theory were barred by a previous decree, and held that no remedy was open to the creditor until after judgment.

The case of Taylor vs. Bowker, 111 U. S., 110, in which is found the above quotation from the Maine case, really turned upon the law in that State as bearing upon the intention of the Legislature in a certain statute. But it is at least to be inferred that the Court regarded the Maine decisions as correctly laying down the principles of equity.

Smith vs. Railroad Co., 99 U. S., 41, was a suit by a creditor of a railroad company to reach bonds due to it from a county. Although Mr. Justice SWAYNE said : " The railroad company is hopelessly insolvent. There is no remedy left to the appellant but to procure the bonds still in arrear ; " yet it was held that the suit would not lie, because there had been no judgment at law.

See also Van Weel vs. Winston, 115 U. S., 228, in which it was claimed that the president of the corporation debtor had taken its money. Mr. Justice MILLER says : " As a creditor of the company, Mr. Van Weel has no right to interfere until he has a judgment

against the company with an execution returned *nulla bona.*" And this was said, although it was fairly evident that nothing could be reached at law.

Also U. S. vs. Un. Pac. R. R. Co., 98 U. S., 569.

Also the two cases of Claflin vs. McDermott, 12 Fed. R., 375, and Walser vs. Seligman, 13 Fed. R., 415, upon the authority of which this case was decided below.

These authorities show that an ordinary creditor's bill is ancillary to proceedings at law; that without such proceedings there can be no such ancillary jurisdiction; and that the legal processes must have been exhausted before a court of equity will lend its aid. It is not a matter of evidence. An allegation that legal process will be fruitless does not avail; a court of equity will not receive tender of such an issue. Exhaustion of legal remedies is essential to its jurisdiction.

Terry vs. Tubman, 92 U. S., 156, cited in appellant's brief, was brought to enforce the statutory liability of stockholders for debts, and turned on the meaning of the statute.

The same comment applies to Shilling vs. Howland, 53 N. Y., 371, and Kincaid vs. Dwinelle, 59 N. Y., 548.

McCartney vs. Bostwick, 32 N. Y., 53, was a case of pure trust brought to reach property not "equitable" (or legal) "assets of the debtor." In the opinion of the Court, written by Judge PORTER, the Court says:

> "The distinction between this case and that of a judgment creditor under the general statute" (the statute regulating or declaring the practice of the courts in creditors' bills), "is very definite and obvious. There, the proceding is to remove impediments in the way of reaching the debtor's property. Here, it is to charge with a statutory lien the

property of a third party which the debtor never owed. There, it is to exercise auxiliary jurisdiction in aid of legal process. Here, it is to enforce a trust of which the courts of law have no jurisdiction."

The case of the National Traders' Bank vs. Wetmore, 124 N. Y., 241, involved the general jurisdiction of chancery over claims against the estates of deceased debtors, and of cases of fraud and trusts. There was no administrator in New York who could be sued, and hence the case, if analogous at all to creditors' suits to collect unpaid subscriptions, is like the "possible exception" suggested in Terry vs. Anderson, where the corporation is dissolved. The correctness of the New York decision seems questionable, at least in view of the decision of this Court in Johnson vs. Powers, 139 U. S., 156, under facts scarcely distinguishable. The *dicta* quoted by the appellant's counsel in Bank vs. Wetmore are not in accord, at all events, with the decision of this Court.

Case vs. Beauregard, 101 U. S., 688, by what was herein *decided*, is certainly not opposed to the above proposition; for the bill was dismissed, and the Supreme Court affirmed. What is said in the opinion, moreover, must be taken in connection with the case before the Court. The paragraph from which appellant's counsel quotes, on page 21 of his brief, closes with these words: "This is certainly true where the creditor has a lien or trust in his favor." The bill in that suit asserted such trust or lien.

II.

Judgment and execution returned unsatisfied in one jurisdiction will not support such a creditor's bill brought in another jurisdiction.

A creditor's bill, being merely ancillary, to aid an execution at law, there must naturally be a principal suit in the jurisdiction where such aid is sought.

In McLure vs. Beneni, 2 Ired., 519, the Court says:

> "We cannot execute a judgment abroad by process here at law, so it seems necessarily to follow that a court of equity here ought not to condemn property that it can lay hold of for the satisfaction of such a judgment. Equity is ancillary to the law in aiding creditors by judgment and execution in our own Courts where it is necessary for their satisfaction."

In Farned vs. Harris, 19 Miss., 371, the bill alleged judgment in Alabama, and that debtor was insolvent. SHARKEY, C. J., says that the plaintiff

> "does not resort to equity to establish an equitable right, but to have equitable assets subjected to what is confessedly a legal right. *The power of Chancery is ample in such cases; but its authority is invoked only in aid of execution process.* Hence the general rule is that, where the object is to reach equitable assets, that an execution must be returned *nulla bona*. But the judgment in Alabama will not entitle the complainant to relief in aid of that judgment in this State."

Similarly, action in the United States Courts at

law will not support an action in the State Courts of the same State in equity.

Tarbell vs. Briggs, 3 Paige, 207.
Steere vs. Hoagland, 39 Ill., 264.
Davis vs. Bruns, 23 Hun (N. Y.), 648.

The Canadian Court passed on the same question in Price vs. Monroe, 10 Can. Law Times, 130, in which it was held that a creditor's bill in Ontario could not be supported by a judgment and execution in Quebec, where the corporation debtor had its "head office." And this is peculiarly pertinent in connection with the doubt suggested in the opinion of Judge WALLACE in this case.

By the judgment in Connecticut the complainant is a judgment creditor only in that State.

McElmoyle vs. Cohen, 13 Pet., 312.
2 Black on Judgments, §§ 862, 863.
Story's Conflict of Laws, § 609.

That judgment may be sued upon in New York, full faith and credit must be given to it for that purpose, but the judgment, as such, has no extra-territorial force.

Execution cannot be issued upon the Connecticut judgment from the law side of the United States Circuit Court in New York; equally that judgment and the execution thereon cannot be the basis for an equitable execution, as a creditors' bill might be called.

The Connecticut execution is, of course, limited to the State of Connecticut, or rather to Hartford County. There is no requirement of the Constitution that faith or credit be given it or the return thereto elsewhere.

Carter vs. Bennet, 6 Fla., 242.

The execution with return *nulla bona* in Connecticut is not even the slightest evidence that the remedy at law in New York will not avail.

For these reasons it is submitted that, for the pur-

poses of the rule as to ordinary creditors' bills, the complainant stands as a mere creditor at large, notwithstanding the judgment and execution and return in Connecticut.

III.

That which is sought to be reached by this bill can be reached by proceedings at law.

The Code of Civil Procedure in New York, § 646, provides:

> "Under a warrant of attachment against a foreign corporation, other than a corporation created by or under the laws of the United States, the Sheriff may levy upon the sum remaining unpaid upon a subscription to the capital stock of the corporation made by a person within the county."

§§ 635 and 636 show that attachment could issue in suit against corporation debtor because it is a foreign corporation. And § 1370 shows that execution covers what has been attached.

The bill herein shows that Ballou is a resident of New York.

Wholly without regard to the preceding points, it is submitted that this consideration is enough to sustain the demurrer and the judgment of the court below.

In Merchants' Bank vs. Sabin, 34 Fed. R., 492, a judgment creditor's bill was dismissed on demurrer because the bill showed property which, under the Minnesota statute, might be reached by execution at law. Judge NELSON says: "If the complainants charge and show in their bill that property of the debtor subject to execution existed at the time he filed his bill, he

does not require a discovery and relief in a court of equity.

It is argued, against this point, that the appellant could not sue the Wiley Construction Company in New York, both being foreign corporations, because of a statute limiting the jurisdiction of the courts of New York.

But the statute referred to does not affect the jurisdiction of the Federal Court in New York. The parties being citizens of different States, the Federal Court in New York would have jurisdiction of an action between them, and in such action this unpaid subscription could be reached by attachment and execution.

U. S. R. S., § 915.
Rules of the Circuit Court of the U. S., Southern District of N. Y.

Since in such action jurisdiction would depend on diverse citizenship, the defendant might object that it was not brought in the district of the residence of either party.

But the right to make such objection is merely a personal privilege, and does not affect the jurisdiction of the Court, properly speaking.

St. L. & St. F. R. R. Co. vs. McBride, 141 U. S., 127.

And this Court is not to presume that such objection will be made.

Russell vs. Clark, 7 Cranch, 69.
Pond vs. Vt. Valley R. R. Co., 12 Blatch., 280.

IV.

Creditors of corporations seeking to reach equitable assets, equally with creditors of individuals, are bound to show that their legal remedies have been exhausted.

See cases heretofore cited :

Terry vs. Anderson, 95 U. S., 628.
Taylor vs. Bowker, 111 U. S., 110.
Smith vs. Railroad Co., 99 U. S., 41.
Van Weel vs. Winston, 115 U. S., 228.
U. S. vs. Un. Pac. R. R. Co., 98 U. S., 569.

Doubt is suggested on this point, perhaps, by the remarks of Chief-Justice WAITE in Terry vs. Anderson, 95 U. S., 628. He says :

> "Ordinarily, a creditor must put his demand into judgment against his debtor and exhaust his remedies at law before he can proceed in equity to subject choses in action to its payment. To this rule, however, there are some exceptions, and we are not prepared to say that a creditor of a *dissolved* corporation may not under circumstances claim to be exempted from its operation. If he can, however, it is upon the ground that the assets of the corporation constitute a trust fund which will be administered by a court of equity in the absence of a trustee, the principle being that equity will not permit a trust to fail for want of a trustee."

There being in the case a trustee who, by decree binding the appellant, had been found to have fully executed his trust, it became unnecessary to decide whether there was any such exception or not. The decree standing, this corporate creditor was held to be within the general rule stated.

The suggestion of such possible exception seems to have been repudiated later by this Court. In Hawkins vs. Glenn, 131 U. S., 319, it is said:

> "Constituting as unpaid subscriptions do, a fund for the payment of corporate debts, *when a creditor has exhausted his legal remedies against the corporation*, which fails to make an assessment, he may, by bill in equity or other appropriate means, subject such subscriptions to the satisfaction of his judgment."
>
> And see other later cases cited.

But it will be seen that the ground of the possible exception suggested in Terry vs. Anderson was lack of any trustee. If a corporation holds its funds in trust, it is the trustee. If it is *dissolved*, and ceases to be, there is no trustee. But if the corporation continues in being, no matter how moribund, this suggestion has no application.

That the Wiley Construction Company still exists, and can sue and be sued, is manifest from the bill.

If there can still be thought to be any exception in respect to corporation creditors, "it is upon the ground that the assets of the corporation constitute a trust fund."

V.

This suit cannot stand as one intended to administer the assets of the corporation as a trust fund, because the corporation is not made a party defendant.

If a corporation holds its funds in trust; then clearly it is the trustee. Whenever the creditor may have the

right to assert such trust, whether with or without judgment and execution at law, he must assert it primarily against the corporation as a trustee. The suit in such case is one to compel the trustee to execute the trust. Recovery can be had against the stockholders on account of this unpaid subscription, only because the Court, finding that the trustee should act, acts in its stead. But the trustee—the corporation—is manifestly a necessary party to such a suit. A suit brought against the stockholder alone cannot be regarded as brought in the right of the trustee. The creditor has no direct relation with the stockholder; his only relation is through the corporation as trustee. Without the presence of the trustee he cannot assert the rights of the trust.

In Patterson vs. Lynde, 106 U. S., 519, Chief Justice WAITE says:

> "The liability of the stockholder to the creditor is through the corporation—not direct. There is no privity of contract between them, and the creditor has not been given, either by the Constitution or the statute, any new remedy for the enforcement of his rights. The stockholder is liable to the extent that the subscription represented by his stock requires him to contribute to the corporate funds, and when sued for the money he owes, it must be in a way to put what he pays, directly or indirectly, into the treasury of the corporation for distribution according to law."

The action was at law. After this decision the plaintiff brought suit in equity in Illinois, but failed to make the corporation a party. The Supreme Court of Illinois, after quoting the above from 106 U. S., 519, say:

"Unless it shall be said that what is here said is not law, and therefore shall not be followed, it is conclusive of this case. The complainants seek to enforce pay-

ment of unpaid subscriptions, not through the corporation, nor in such manner as to bring the money directly into the treasury of the corporation, but so as to put the amount directly into their own pockets, disregarding the rights of other creditors and the equities of these defendants in respect to other stockholders."

Patterson vs. Lynde, 112 Ill., 204.

In Handley vs. Stutz, 137 U. S., 366, Mr. Justice GRAY says:

> "This is a bill in equity by some in behalf of all the creditors of the corporation against the corporation and holders of stock therein. The bill is not founded on any direct liability of the stockholders to the plaintiffs, but on the theory that the corporation, being insolvent and having no other assets, the sums due to it from the stockholders on their unpaid subscriptions to stock ought to be paid by them to the corporation as a trust fund to be distributed among the plaintiffs and all other creditors of the corporation so far as required to satisfy their just claims, and that the corporation having neglected to collect these sums or to administer the trust, and the plaintiffs and defendants being citizens of different States, the Circuit Court should compel those sums to be paid in by the stockholders to be administered as a trust fund and to be distributed among all creditors who should come in."

In Walsh vs. R. R. Co., 6 Fed. R., 793, the corporation was held to be "a necessary party to a bill to enforce a judgment against it by compelling contribution from its stockholders."

See also Dormitzer vs. Bridge Co., 6 Fed. R., 217, in which the corporation was shown to be quite as moribund as in the present case.

In First Nat. Bank vs. Smith, 6 Fed. R., 215, the bill

seems to have been very similar to the present bill. Judge NELSON says: "Such decrees cannot be made in suits when the corporations are not parties, or by a Court having no jurisdiction to require the legal presence of the corporation to the proceedings. The Conrt refuses to entertain a suit where a person whose legal presence in the proceedings is necessary cannot be subjected to its jurisdiction."

See also

McRea vs. Branch Bank, 19 How., 376.
Davenport vs. Dows, 18 Wall., 626.
Kendig vs. Dean, 97 U. S., 423.
Cunningham vs. Pell, 5 Paige, 610.
Robinson vs. Smith, 3 Paige, 222.

In Western R. R. Co. vs. Nolan, 48 N. Y., 517, the Court say:

> "The plaintiff should be regarded as a *cestui qui trust* and interested in said fund. The trustees are the parties in whom the fund is vested, and and whose duty it is to maintain and defend it against wrongful attack or injury tending to impair its safety or amount. The title to the fund being in them, neither the *cestuis* nor the *beneficiaries* can maintain an action in relation to it as against third persons, except in case the trustees refuse to perform their duty in that respect, and then the trustees should be brought before the Court as parties defendant. * * * The plaintiff has not for these reasons *made any case entitling it to bring this action.*"

Case came up on judgment dismissing the complaint.

In Hatch vs. Dana, 101 U. S., 205, on which appellant especially relies, the corporation was made a defendant.

So, too, in Handley vs. Stutz, 139 U. S., 417.

This is not an objection merely that the suit cannot be tried without bringing in the corporation at the trial. It goes to the very nature of the suit and to the question whether a cause of action is stated. No cause of action through the company, in the right of the company as trustee, can be found in a bill which neither asserts cause why the suit is not brought by it, nor makes it a party defendant.

VI.

The judgment appealed from should by affirmed.

THOMAS THACHER,
Counsel for Appellee.

146 U.S. 57

Office Supreme Court U. S.
FILED.
APR 1 1893
JAMES H. McKENNEY,
CLERK.

United States Supreme Court.

October Term, 1892—Term No. 70.

THE NATIONAL TUBE WORKS COMPANY,

Appellant,

vs.

GEORGE WILLIAM BALLOU,

Respondent.

PAPERS ON MOTION TO RECALL MANDATE AND REFORM DECREE.

The Evening Post Job Printing House, New York.

IN THE

Supreme Court of the United States.

THE NATIONAL TUBE WORKS COMPANY, Appellant and Complainant, AGAINST GEORGE WILLIAM BALLOU, Respondent and Defendant.	October Term, 1892. No. 70.

Now comes the complainant and appellant and moves this Court that the mandate herein be recalled and the decree of this Court be reformed by adding at the end thereof, after the words "affirmed with costs" the words "with leave, however, to the complainant to make and file an amended complaint."

W. J. CURTIS,
Solicitor for Appellant and Complainant.

4 IN THE SUPREME COURT OF THE UNITED STATES.

THE NATIONAL TUBE WORKS COMPANY,
Complainant,

AGAINST

GEORGE WILLIAM BALLOU,
Defendant.

5 UNITED STATES OF AMERICA, } ss.:
Supreme Court, Southern District of New York.

WILLIAM J. CURTIS, being duly sworn, deposes and says: That he is the solicitor for the complainant above named. That the bill of complaint was filed herein in the U. S. Circuit Court for the Southern District of New York on the 1st day of November, 1888, on behalf of the complainant, the National Tube Works Company, and against the defendant, George William Ballou, for the cause of action set forth in the complaint on pages 1 to 3 of the Record, which is substantially as follows:

The complainant is a creditor of the Wiley Con-
6 struction Company, a corporation organized under the laws of the State of Connecticut, in the sum of $52,041.51, and that it has recovered judgment against the said Construction Company in the Superior Court of Hartford County, Connecticut, where said company was domiciled, and that execution upon said judgment has been returned unsatisfied and said judgment has never been paid. That the said Wiley Construction Company was a corporation organized with a capital stock of five hundred thousand dollars, of which the defendant

Ballou had subscribed for $249,900, but no part 7
thereof had been paid, and that this action was be-
gun by the complainant to compel an accounting by
the said defendant of the amount unpaid upon the
stock subscription, in order that the said defendant
might be decreed to pay so much of the said balance
as should be sufficient to pay the debts of said cor-
poration, including the claim and judgment of the
complainant. To this bill of complaint defendant
filed a general demurrer, which will be found at page
7 of the Record. This demurrer was sustained by
the Circuit Court and a decree was entered in said
Court on the 25th day of March, 1889, dismissing
the complaint, with costs. In his opinion sustain-
ing the demurrer, Judge Wallace stated that he sus- 8
tained the demurrer to the bill upon the authority
of previous decisions of the Circuit Court, but that,
as those cases were decided by him, he felt no hesi-
tation in saying that he doubted whether they did
not adopt a too technical view of the right of the
creditor whose judgment has been obtained against
his debtor at the place of his domicile and whose ex-
ecution has been issued there and returned unsat-
isfied, to maintain a creditor's bill in another State;
and he then suggested that the case be taken to the
Supreme Court for review. An appeal was accord-
ingly taken to this Court and the case argued at the
October Term, 1892, and a decision was handed
down by this Court affirming the decree of the 9
lower Court. A copy of the opinion of the Court
is annexed hereto and made a part hereof.

Thereupon, and on or about the 7th day of March, 1893, a mandate of this Court was issued to the Circuit Court of the United States for the Southern District of New York, and the same has been filed before the said Supreme Court, on the said transcript of record, and was argued by counsel:

On consideration whereof, it is now here ordered, adjudged and decreed by this court that the decree

10 complainant had obtained or attempted to obtain a judgment against the corporation in New York, nor that it was impossible to obtain such a judgment. As a matter of fact, it is and was impossible for complainant to obtain a judgment against the Wiley Construction Company in New York. The complainant was a Massachusetts corporation, with its principal place of business at Boston; its debtor was a Connecticut corporation, domiciled and to be found only at Hartford, in the State of Connecticut. The State courts of New York have no jurisdiction in an action between these corporations founded on a debt incurred, as this one was, outside of the State (see Sec. 1780 of the Code of Civil Procedure of the State
11 of New York), nor could jurisdiction be obtained in the United States Court for the Southern District of New York, and yet New York City is the only place where the defendant, the stockholder who has not paid his subscription, can be found. If the complainant cannot recover against him in the forum in which this suit is brought, the complainant is without remedy.

The bill of complaint herein can be amended under the decision of this Court so as to conform to the law as therein laid down, and so as to entitle the complainant to recover in this action, by adding the necessary allegations of fact showing the impossibility of obtaining judgment against the company
12 in the State of New York. Unless the complainant be allowed to amend its complaint it will be without remedy, because, by reason of the great length of time that has elapsed since this case has been pending on appeal, it is a grave question whether a new suit is not barred by the Statute of Limitation.

Sworn to before me this 24 day of March, 1893. } W. J. Curtis

John A. Sheldon
U.S. Commissioner
S.D. of N.Y.

Commissioners Seal.

UNITED STATES OF AMERICA, SS.: 13

[SEAL OF THE SUPREME COURT OF THE UNITED STATES.]

The President of the United Sates of America to the Honorable the Judges of the Circuit Court of the United States for the Southern District of New York, GREETING:

Whereas, lately in the Circuit Court of the United States for the Southern District of New York, before you, or some of you, in a cause between the National Tube Works Company, complainant, and George William Ballou, defendant, wherein the decree of the said Circuit Court, entered in said cause on the 25th day of March, A. D. 1889, is in the following words, viz.: 14

"This cause having been brought on to be heard on a bill of complaint and demurrer, and having been argued by counsel, and the demurrer having been sustained, on consideration thereof, it is ordered, adjudged and decreed by the court that the complainant's said bill of complaint be and the same is hereby dismissed, and that complainant pay to defendant the sum of twenty-eight $\frac{62}{100}$ dollars as taxed herein, and that defendant have execution therefor.

WM. J. WALLACE."

as by the inspection of the transcript of record of the said Circuit Court, which was brought into the Supreme Court of the United States by virtue of an appeal agreeably to the act of Congress, in such case made and provided fully and at large appears. 15

And whereas, in the present term of October, in the year of our Lord one thousand eight hundred and ninety-two, the said cause came on to be heard before the said Supreme Court, on the said transcript of record, and was argued by counsel:

On consideration whereof, it is now here ordered, adjudged and decreed by this court that the decree

16 of the said Circuit Court in this cause be and the same is hereby affirmed with costs; and that the said defendant, George William Ballou, recover against the said complainant for his costs herein expended and have execution therefor.

December 19, 1892.

You, therefore, are hereby commanded that such execution and proceedings be had in said cause, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 7th day of March, in the year of our Lord one thousand eight hundred
17 and ninety-three.

Costs of defendant paid by complainant.

JAMES H. MCKENNA,
Clerk of the Supreme Court of the United States.

OPINION.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Suit by the *National Tube Works Company* against *George William Ballou* for an accounting of the amount unpaid on a subscription by defendant to the stock of the *Wiley Construction Company*, and to have the same applied to a judgment recovered
18 by plaintiff against said *Wiley Construction Company*. A demurrer to the bill was sustained by the Circuit Court (42 Fed. Rep., 749). Plaintiff appeals.

BLATCHFORD, *J.*—This is a suit in equity, brought in the Circuit Court of the United States for the Southern District of New York on November 1, 1888, by the *National Tube Works Company*, a Massachusetts corporation, against *George William Ballou*, a citizen of New York.

The bill sets forth that the *Wiley Construction* 19
Company was a corporation organized in February, 1880, under the joint stock laws of Connecticut, and located in Hartford, in that State. The bill is filed on behalf of the plaintiff and such other creditors of the *Wiley Company* as may come in and be made parties to the suit and contribute to the expenses thereof. It sets forth that the capital stock of the *Wiley Company* was fixed at $500,000, divided into 5,000 shares of $100 each; that all of the stock was subscribed for; that the defendant subscribed and agreed to pay at par for 2,499 shares; that he had never paid in anything on account of such subscription; that immediately after the organization of the company it proceeded 20
to carry on its business, and continued to do so until about July, 1883, the defendant and the other subscribers to the stock taking an active part in the management, and acting as stockholders and directors of the company; that between May, 1880, and August, 1882, the plaintiff sold and delivered to it merchandise at the agreed price of $78,955.49; that it had paid $40,789.51 on account thereof; that on March 10, 1883, the *Wiley Company*, being then indebted to the plaintiff in $49,828.37, gave to the plaintiff its promissory note for that amount, with interest; that no part of the note had been paid; that in October, 1886, in the Superior Court of the County of Hartford, in the State of Connecticut, the plaintiff re- 21
covered a judgment on said note against the *Wiley Company* for $52,041.51, damages and costs, that company having been duly served with process, and having appeared in the action; that in June, 1887, the judgment was, on appeal, affirmed by the Supreme Court of Errors of Connecticut, and is still in force; that execution was issued out of said Superior Court against the property of the *Wiley Company* to the Sheriff of Hartford County, wherein the principal office

22 of said company was situated, and had been returned unsatisfied; that the *Wiley Company* had no fund or assets wherewith to pay the claim of the plaintiff, and that the whole of the $52,041.51 was still due to it.

The prayer of the bill is that an accounting be had of the amount unpaid on the stock subscription of the defendant in the *Wiley Company*, and that he be decreed to pay so much of the balance found unpaid on his subscription as will be sufficient to pay such debts of the *Wiley Company* as may be proved in this suit, including the said judgment in favor of the plaintiff. The *Wiley Company* is not made a party to the suit.

23 There is not in the bill any statement that the plaintiff has recovered any judgment against the Connecticut corporation in any court of the state of New York, or in any court of the United States within the state of New York, or issued an execution within the state of New York to collect its claim against the *Wiley Company;* nor does the plaintiff allege in its bill any reason why it has not done so, or why it cannot do so.

The defendant demurred to the bill, and set forth as ground of demurrer that the plaintiff did not by its bill make such a case as entitled it in a court of equity to any discovery or relief touching any of the matters contained in the bill, and also that it appeared by the

24 bill that the plaintiff was not entitled to the discovery or relief prayed for. The case was heard before JUDGE WALLACE in the Circuit Court, and a decree was entered, dismissing the bill, with costs. The plaintiff has appealed to this court.

In his opinion in the case JUDGE WALLACE states that he sustains the demurrer on the authority of his decisions in *Claflin v. McDermott*, 20 Blatchf. 522, 12 Fed. Rep. 375, and *Walser v. Seligman*, 21 Blatchf. 130, 13 Fed. Rep. 415; that he feels free to say that he doubts whether those cases did not

adopt too technical a view of the right of a creditor whose judgment has been obtained against his debtor at the place of the latter's domicile, and whose execution has been issued there and returned unsatisfied, to maintain a creditor's bill in a court of another state; and that he may be permitted to express the hope that the present case may be taken to this court for review. 25

In *Claflin v. McDermott, supra*, it was held that a creditor's bill, founded on a judgment recovered against a debtor in a state court in California, would not lie in a Circuit Court of the United States in New York, to set aside a fraudulent transfer of personal property made by the debtor in California, by means of collusive judgments and sales under executions issued thereon, no judgment having been obtained or execution issued in such Circuit Court or in any state court of New York. The case of *Tarbell v. Briggs*, 3 Paige, 207, was cited as authority, where the court of chancery of the state of New York refused jurisdiction of a creditor's bill filed to obtain satisfaction of a judgment rendered in the Circuit Court of the United States for the Southern District of New York, and upon which an execution had been returned unsatisfied, the judgment being treated as a foreign judgment, and as standing on the same footing with the judgments of a court of another state. The principle invoked was that the plaintiff's remedy at law had not been exhausted by the issuing and return of an execution on a foreign judgment, and *McElmoyle v. Cohen*, 13 Pet. 312, was referred to as authority. 26 27

In *Walser v. Seligman, supra*, creditors and stockholders of a corporation organized under the laws of Missouri and Kansas brought a suit in equity in the Circuit Court of the United States for the Southern District of New York against certain persons to enforce the liability of the latter as holders of a number of shares of unpaid capital stock of

28 the corporation, without the corporation being made a party to the suit, and without the plaintiffs being judgment creditors elsewhere than in Missouri; and the court held that, the plaintiffs being merely creditors at large, and not having exhausted their remedy at law in New York, and the Missouri judgments not having in New York the force of domestic judgments, except for the purpose of evidence, the bill would not lie.

The bill in the present case is defective in that respect. It alleges only the recovery of a judgment against the corporation in Connecticut, and the issuing and return there of an execution unsatisfied. It does not allege any judgment in New York, or
29 any effort to obtain one, nor does it aver that it is impossible to obtain one. It alleges merely that the corporation has no fund or assets wherewith to pay the claim of the plaintiff.

Where it is sought by equitable process to reach equitable interests of a debtor the bill, unless otherwise provided by statute, must set forth a judgment in the jurisdiction where the suit in equity is brought, the issuing of an execution thereon, and its return unsatisfied, or must make allegations showing that it is impossible to obtain such a judgment in any court within such jurisdiction. *Taylor* v. *Bowker*, 111 U. S., 110, 4 Sup. Ct. Rep., 397; *Webster* v. *Clark*, 25 Me., 313; *Parish* v. *Lewis*, Freem.
30 Ch., 299; *Brinkerhoff* v. *Brown*, 4 Johns. Ch., 671; *Dunlevy* v. *Tallmadge*, 32 N. Y., 457; *Terry* v. *Anderson*, 95 U. S., 628; *Smith* v. *Railroad Co.*, 99 U. S., 398, 401; *Hawkins* v. *Glenn*, 131 U. S., 319, 334; 9 Sup. Ct. Rep., 739; *McLure* v. *Benceni*, 2 Ired. Eq., 513, 519; *Farned* v. *Harris*, 11 Smedes & M., 366, 371, 372; *Patterson* v. *Lynde*, 112 Ill., 196.

Decree affirmed.

W. J. CURTIS, for Appellant.

THOMAS THACHER, for Appellee.

146 U.S. 517

Office Supreme Court U. S.
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APR 1 1893
JAMES H. McKENNEY,
CLERK.

United States Supreme Court.

OCTOBER TERM, 1892—TERM No. 70.

THE NATIONAL TUBE WORKS COMPANY,
Appellant,

vs.

GEORGE WILLIAM BALLOU,
Respondent.

ARGUMENT IN SUPPORT OF MOTION TO RECALL MANDATE AND REFORM DECREE.

W. J. CURTIS,
Counsel for Appellant.

The Evening Post Job Printing House, New York.

United States Supreme Court.

THE NATIONAL TUBE WORKS COMPANY,
Complainant and Appellant,

AGAINST

GEORGE WILLIAM BALLOU,
Defendant and Appellee.

This is a motion to recall the mandate and reform the decree of this Court by inserting a provision therein giving complainant permission to make and file an amended complaint.

Argument.

I.—Complainant can amend its complaint so as to overcome the objection raised by the demurrer.

The demurrer is sustained by this Court for the following reason:

> "Where it is sought by equitable process to "reach equitable interests of a debtor, the "bill, unless otherwise provided by statute, "must set forth a judgment in the jurisdic- "tion where the suit is brought, the issuing of "an execution thereon and its return unsatis-

" fied, or must make allegations showing that
" it is impossible to obtain such a judgment in
" any court within such jurisdiction."

Complainant is prepared to allege that it is impossible to obtain a judgment against the Wiley Construction Company in any court within the jurisdiction where this suit is brought.

II.—It is within the power of this Court to grant the relief asked for.

In Lacassagne *vs.* Chapins, 144 U. S., 119, where a demurrer to the complaint had been sustained in the Circuit Court and a decree entered dismissing the bill, this Court held the demurrer to be good, but, in affirming the decree, directed that it be so modified as to declare that the bill was dismissed without prejudice to an action at law.

In Scott *vs.* Neely, 140 U. S., 106, where the Circuit Court had rendered a decree in favor of the plaintiffs in a suit in equity to subject to the payment of a debt alleged to be due and owing to the plaintiffs certain property standing in the name of the defendants, this Court reversed the decree on the ground that the Court below could not take jurisdiction of a suit in which a claim properly cognizable only in law was united in the same pleadings for equitable relief; but in framing its judgment this Court directed that the decree be reversed, and that the cause be remanded, with directions to dismiss the bill without prejudice to an action at law for the judgment claimed.

In Mollen *vs.* Torrance, 9 Wheaton, 537, the judgment of the Court was as follows:

" This cause came on to be heard on the trans-
" cript of the record of the District Court of the

"United States for the District of Mississippi,
"and was argued by counsel. On considera-
"tion whereof, this Court is of opinion that
"there is error in the judgment of the said
"District Court in overruling the demurrer
"of the plaintiffs to the plea of the defendant,
"and in giving judgment for the defendant;
"wherefore it is considered by this Court that
"the said judgment be reversed and annulled,
"and it is hereby reversed and annulled ac-
"cordingly; and the said cause is remanded to
"the said District Court, with liberty to the
"parties to amend their pleadings, and that
"further proceedings may be had therein, ac-
"cording to law."

In U. S. *vs.* Kirkpatrick, 9 Wheaton, 720, this Court in reversing the judgment of the District Court, directed that the parties be allowed liberty to amend their pleadings.

This Court has power not only to recall its mandate, but to revoke the same if necessary in the interests of justice.

See *Ex parte* Crenshaw, 15 Peters, 119,
and U. S. *vs.* Gomez, 23 Howard, 326.
Gregory *v.* Boston Safe Dep. Co., 144
U. S., 655.

III.—Complainant will be without remedy if this motion be not granted.

See affidavit of W. J. Curtis in the the moving papers.

IV.—The motion should be granted.

W. J. Curtis,
Counsel for Appellant.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No. 70.

THE NATIONAL TUBE WORKS COMPANY,
Appellant,

vs.

GEORGE WILLIAM BALLOU,
Appellee.

Brief for Appellee in Opposition to Motion to recall Mandate, etc.

THOMAS THACHER,
Counsel.

C. G. Burgoyne, Walker and Centre Sts., N. Y.

SUPREME COURT OF THE UNITED STATES.

THE NATIONAL TUBE WORKS COMPANY,
Appellant,

vs.

GEORGE WILLIAM BALLOU,
Appellee.

Brief for Appellee in Opposition to Motion to Recall Mandate, &c.

I.

The motion is late.

The appeal was decided December 19, 1892; and on that day this Court made the decree which the appellant now asks to have reformed, that the decree of the Circuit Court, dismissing the bill, be affirmed with costs. The mandate was issued March 7th, 1893, and had been filed in the Circuit Court when this motion was noticed (Motion Papers, fol. 9).

II.

The decree of this Court is exactly in accordance with its decision, and the mandate conforms to the decree; hence the motion should be denied.

The conclusion of the opinion is "Decree affirmed."

The decree of this Court adjudges "that the decree of the said Circuit Court in this cause be, and the same is hereby, affirmed with costs."

The mandate states the decree below, and the decree of affirmance, and commands such execution and proceedings as ought to be had.

That the decree and mandate were wholly in accordance with the decision and intention of this Court, is not, and cannot be, disputed.

Where there is no occasion to change the decree or mandate *to give effect to the intent of this Court*, a motion to recall and correct the mandate will be denied.

Phipps vs. Sedgwick, 131 U. S., CXXXIX. (L. Ed., 24, 595).

III.

Appellant really seeks to change the DECISION *of this Court, and that, too, in order to secure a privilege never before asked for.*

It wants the case opened that it may ask leave to amend its bill, dismissed by a final judgment which this Court has reviewed and affirmed. Neither in the Court below nor in this Court has it hitherto asked for such privilege.

See Le More vs. U. S., 131 U. S., lxxxv. (L. ed., 19-201).

As an application in effect for a rehearing, the motion comes under the condemnation of the rule referred to in Shreveport vs. Holmes, 125 U. S., 694.

IV.

If this privilege of amending the bill had been asked at the hearing in this Court, it would not have been granted; the decision, decree and mandate would not have been changed.

Where no errors are found in the record, all this Court can do is to affirm the judgment.

Ry. Co. vs. Twombly, 100 U. S., 78.
R. R. Co. vs. Morgan, 10 Wall., 256.

In U. S. vs. Tingey's Admrs., 5 Pet., 131, the defendant, plaintiff in error, "moved the Court to amend the judgment * * * by instructing the Court below to permit him to withdraw his demurrer." The motion was overruled, the Court holding "that, although this might have been done upon a reversal, yet it cannot be done where the judgment of the Court has been affirmed, as this Court cannot disaffirm its judgment."

The judgment appealed from ended the cause. This Court affirms that judgment, finding no errors upon which to disturb it. How can it, in the same breath, allow an amendment of the bill which is wholly without purpose if the judgment stands?

When Judge WALLACE rendered his decision, the appellant might have been permitted to amend. It did not ask for this. It elected to stand upon the bill as it was; it relied upon showing error in the Judge's conclusion upon appeal. And so it allowed *final judgment* to be entered. No appeal could have been taken otherwise. But its appeal has failed. This Court finds no error and affirms the judgment. The appellant would now like to choose over again; to ignore the judgment, the finality of which is essential to the jurisdiction of this Court, or rather, perhaps, to change it into a mere order for judgment with leave to amend. It asks this Court, whose right to speak in the premises arises out of the finality of the judgment,

when it affirms it, to declare it to be, or change it into, a mere interlocutory order not final.

The cases cited in appellant's brief on this motion do not support its application.

In Lacassagne vs. Chapins, 144 U. S., 119, and in Gregory vs. Boston Safe Deposit Co., 144 U. S., 655, this Court decided that the decree of the court below *was not correct*, that there was *error* in not providing that the dismissal be without prejudice, in one case to an action at law, in the other to plaintiff's claim in another suit pending, and it therefore *modified the decree.* In this case the Court finds no error, finds the decree exactly as it should be and affirms it. And what the appellant now asks is not that the decree below be modified. Its counsel does not venture to argue that the *final decree* dismissing his bill ought to have contained the leave to amend which he now asks.

In Scott vs. Neely, 140 U. S., 106; Mollen vs. Torrence, 9 Wheat., 537, and U. S. vs. Kirkpatrick, 9 Wheat., 720, the judgments or decrees were *reversed.*

What would the proposed leave to amend avail, if the final judgment is undisturbed ?

V.

The motion papers show that appellant could not improve its bill of complaint by amendment.

There is not a *fact* proposed to be averred, by amendment, as appears by the affidavit of appellant's counsel, which was not before this Court upon the hearing.

Mr. Curtis assumes that the demurrer would necessarily have been overruled if his bill had shown the impossibility of getting judgment against the Construc-

tion Company in New York (affidavit, fol. 9). We do not so read the opinion. But, this being taken as correct, how does it appear that the bill could be improved by amendment?

Mr. Curtis says (fol. 10) that it is, and was, impossible to obtain a judgment against the Wiley Construction Company in New York. This is, of course, mere conclusion. The *facts* which he states on the same page are precisely the same as those discussed upon the argument. (See Appellant's Brief, pp. 3, 7, *et seq.*, and Appellee's Brief, pp. 11, 12.) The affiant knows of nothing to add to the bill, unless it be allegations showing the statutes of New York—which are wholly unnecessary, because the Federal Courts take judicial notice of the statutes. They were before this Court as fully in law as they were in fact, upon the hearing of the appeal.

Lastly.

The motion should be denied.

THOMAS THACHER,
Counsel for Appellee.

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146 U.S. 17

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1892.

No. 70.

THE NATIONAL TUBE WORKS COMPANY

vs.

GEORGE WILLIAM BALLOU.

Brief of W. Hallett Phillips in Opposition to Motion to Recall Mandate and Reform Decree.

On March 18, 1889, Judge Wallace, holding a circuit court for the southern district of New York, dismissed the bill of complaint in this cause. The ground of the decision was that a creditor who had obtained a judgment against his debtor at the place of his domicile could not maintain a creditor's bill in a court of another State before obtaining judgment there also.

From this decree the complainant prosecuted an appeal to this Court. On December 19, 1892, the decree was affirmed. On March 7, 1893, the mandate issued, and was filed in the court below. The appellant now moves that the mandate be recalled and the decree of this Court

change in the decree is sought because complainant does not consider the decree entered a proper one for reasons now presented for the first time. The case does not come within the rule which allows this Court to amend a decree which has by inadvertence or mistake been entered in a different form from that in which it was intended. As the decree was in exact conformity to the intention of the court, it must stand as entered.

(Elizabeth *vs.* Am. Nicholson Pavement Company, 131 U. S., App. CXLIX.)

W. HALLETT PHILLIPS,
Of Counsel.